LEGAL RIGHTS AND RESPONSIBILITIES OF THE DEAF AND DUMB.

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PEET, Harvey Prindle, educator, b. in Bethlehem, Litchfield co., Conn., 19 Nov., 1794; d. in New York city, 1 Jan., 1873. His early life was spent on his father's farm, and by teaching in the district school he earned means to procure his education. After graduation at Yale in 1822 he became an instructor in the asylum for the deaf and dumb in Hartford, of which he was soon made superintendent. In 1831 he was appointed principal of the institution for the deaf and dumb in New York city, which under his care became successful. He resigned the principalship in 1868, but was emeritus principal until his death. For fourteen years he was president of its board of directors. Dr. Peet received the degree of LL. D. from the University of New York in 1849, and that of Ph. D. from the National deaf-mute college in 1871. The want of suitable elementary books for deaf-mutes led him to prepare a series, which is now in general use, entitled "Course of Instruction for the Deaf and Dumb" (New York, 1844–'6). He also wrote "Scripture Lessons for the Deaf and Dumb" (1846); "Statistics of the Deaf and Dumb" (1852); "Report on Education of the Deaf and Dumb in Higher Branches" (1852); "Letters to Pupils on Leaving the New York Institution for the Deaf and Dumb" (1854); "Legal Rights, etc., of the Deaf and Dumb" (Utica, 1856); "History of the United States of America" (New York, 1869); and contributed articles on his specialty to the "American Journal of Insanity" and to the "American Annals for the Deaf and Dumb."—His son, **Isaac Lewis**, educator, b. in Hartford, Conn., 4 Dec., 1824, was graduated at Yale in 1845, and at the Union theological seminary in 1849. In 1851 he visited Europe to study methods of teaching deaf-mutes. On his return in 1852 he was elected vice-principal of the New York institution for the deaf and dumb, and since 1867 he has been its principal. In 1881 he went as the representative of all the American institutions for the deaf and dumb to the International congress in Milan, Italy. He has been active in shaping the legislation of the state of New York with regard to deaf-mute instruction, and also secured provision for the instruction of children under the age of twelve years. Columbia gave him the degree of LL. D. in 1872. He has written many reports, memoirs, and works on the education of deaf-mutes.—Another son, **Edward**, educator, b. in Hartford, Conn., 28 May, 1826; d. in New York city, 27 Jan., 1862, was graduated at the University of New York in 1847. He then visited France, and on his return studied law, and in 1849 was chosen professor in the New York institution for the deaf and dumb. He studied theology at Union theological seminary, but never preached. He was the author of text-books for mutes. — Another son, **Dudley**, physician, b. in Hartford, Conn., 9 July, 1830; d. in New York city, 18 April, 1862, was graduated at Yale in 1852, studied and practised medicine in New York, and became an instructor in the New York institution for deaf-mutes. He was the author of a "Manual of Inorganic Chemistry for Students" (New York, 1865), which was revised and enlarged by Isaac L. Peet (1868).

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F. L. Westbrook Esquire

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ON THE

LEGAL RIGHTS AND RESPONSIBILITIES

OF THE

DEAF AND DUMB.

BY

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PRESIDENT OF THE NEW YORK INSTITUTION FOR THE DEAF AND DUMB.

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ON THE

LEGAL RIGHTS AND RESPONSIBILITIES

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DEAF AND DUMB.

THE questions involved in this subject are obviously of no small importance, and it is remarkable that they have hitherto received so little consideration from our profession, in America at least, and that so little pertinent to the inquiry before us can be found in English and American jurisprudence. Our statute books, except in provisions for their education, are silent respecting the Deaf and Dumb, and cases bearing on the questions submitted to us, are rare in our law books. In the French, and perhaps in the German works on the Deaf and Dumb, and on medical jurisprudence, the subject before us is more fully and satisfactorily discussed and illustrated, than it is in our own language. Some foreign codes also, like the Roman Code of Justinian, embrace positive enactments respecting the Deaf and Dumb. Though what was law in Rome, or is law in France and Germany, is not law in the United States; still, as in the absence of positive enactments, we have to be guided by the general principles of justice and jurisprudence, it will be instructive and useful, as well as interesting, to know what views of the several questions before us, or involved in our subject, have been, after careful research and mature deliberation, solemnly put forth in other countries, or in other ages of the world. And the value of such lights as may be shed on our subject from the labors of foreign jurists will be the greater, that in the few English and Ameri-

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can cases we have, there seems to be little uniformity of principle. Of statute law, relating to the legal rights and liabilities of the Deaf and Dumb, we have found nothing,* and the common law remains to be settled. Let us hope that it will prove fortunate that its settlement has been reserved for an age of greater light and liberality of sentiment, and of juster views of the peculiar condition of this exceptional class of persons.

We find but very little respecting the Deaf and Dumb in any code of laws before the celebrated Code of Justinian, promulgated in the sixth century of our era, which, in later ages, became the foundation of most of our modern European jurisprudence. The law of Moses (the most ancient code extant) imposes no disqualifications on the Deaf, and mentions them only to forbid, in the name of Jehovah, those impositions on the unfortunate to which their infirmities might incite the vicious or the unthinking. "Thou shalt not curse the deaf, nor put a stumbling block before the blind, but shalt fear thy God. I am the Lord."†

After a diligent search through the Oriental codes, the earliest monuments we have of jurisprudence, very little was found relating to this class of persons, except among the laws of the Hindoos. In the ordination of the Pundits, or code of Gentoo laws, whoever was "Deaf from his mother's womb," or whoever was Dumb, was classed among the persons incapable of inheritance. (Halked's translation of the Gentoo laws from the Persian and Sanscrit, London, 1776.) Though excluded from inheriting, they were not however left unprovided for, but the person who superseded them in the inheritance was bound to support them; in the language of the ordinance, to allow them clothes and victuals. Whether or not they were allowed to

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* Since writing the foregoing, our attention has been called to the laws of Georgia, which will be hereafter cited.

† Leviticus, xix. 14. It is somewhat remarkable that the law of Moses does not specify deafness and dumbness among the blemishes which disqualified the sons of Aaron from serving in the priest's office. (See Leviticus, xxi. 17–21.) Blindness, lameness, personal deformity, and some other defects were specified; but if the deaf, or even the idiotic and insane were excluded, it was by implication, not by direct precept. Was this omission because these infirmities were less common in those days than they have become in later times, or because the mere want of intelligence would sufficiently prevent the Deaf Mute or idiot from claiming the priest's office?

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marry, does not appear, but as the code provides that the sons of all those who are excluded from the inheritance, may, if free from all objection, inherit the share to which their parent would be entitled, it is possible that the Dumb, or those "Deaf from their mother's womb" were not positively interdicted from marrying.

It is usually taken for granted that, under the laws of Lycurgus, Deaf-Mute children shared the fate of the sickly and deformed; but this may be doubted. The institutions of Lycurgus were designed to form a nation of soldiers, and all children who were judged incapable of becoming soldiers, or mothers of soldiers, were ruthlessly exposed to death; but it does not follow that Deaf Mutes merely as such, fell under this inhuman doom. Seldom deficient in animal courage, and often excelling in that quickness of eye and hand so valuable in a hand to hand struggle, Deaf-Mutes, though not adapted for scouts or sentinels, still might have stood in the foremost ranks of the phalanx, undistinguishable in battle from the best soldiers who possessed hearing and speech.

We can, in the absence of any further positive information as to the laws of the ancients, easily divine what the general practice must have been, by considering what is, at this day, the social condition of most uneducated, and of many partially educated Deaf-Mutes. Unable to communicate with any but their immediate relatives, and more intimate acquaintances, knowing but little of what is going on in the community, and ignorant of statute laws, and of legal forms and proceedings, their degree of intelligence very seldom correctly appreciated, or their rights understood, they remain for life practically in the condition of children or minors. If affectionate and docile, they remain in the family, mere drudges—treated we are happy to believe, in most cases humanely and affectionately, but seldom receiving that equitable reward for their labor, or equitable division of inherited property, which could not be withheld from one knowing, and able to claim publicly his rights. If on the contrary, they grow up to be perverse, suspicious, and of unsteady habits, the natural results of injudicious indulgence, they often become vagrants, depending for support on the compassion of their acquaintances, or an occasional days' work, eked out by beggary and theft. In the former condition undoubtedly the

happiest, the law never has occasion to notice a Deaf Mute, except in rare cases, when he may be the legal inheritor of property so considerable, that his self-elected guardians may attempt to secure it by means which other relatives may think it a promising speculation to call in question. In the latter case, his transgressions, though we shall hereafter cite some terrible exceptions, are seldom greater than those of idle boys, and are, for the most part, overlooked through compassion for his infirmities. Cases sometimes occur in which uneducated Deaf Mutes evince an ability to manage their own affairs, and even acquire property by their own industry; but this is rare. The greater number remain by general consent, as is the case with idiots, in a state of perpetual tutelage. Hence we may suppose that, in those times when a system of laws and jurisprudence is slowly forming, while as yet, each little community in the State deals with rare or novel cases according to the instincts of the national common sense, Deaf Mutes would be practically treated, not according to any arbitrary rule, made or intended to be made for the greater number of cases, and, of course, unjust to the exceptional cases, but according to the degree of intelligence actually manifested in each individual case.

Though the *principle* just stated is evidently in accordance with reason and justice, still, in its practical application, there is great room for error. The magistrate before whom such cases might be brought, is seldom well qualified to judge of the actual degree of intelligence of the Deaf Mute, and is usually unable to interrogate him even as to his actual wishes. It was probably the occurrence of cases in which, by taking the representations of interested parties as to the degree of intelligence, or even the actual purpose of the Deaf Mute, injustice had been done, that prompted the provisions of the Code of Justinian. In this celebrated code, the Deaf and Dumb from birth, are, without exception, and without regard to the degree of their intelligence, condemned to a perpetual legal infancy. The code assumes throughout that Deaf Mutes from birth are incapable of managing their own affairs; in this respect being considered as on a footing with the insane, and those who were incapable of managing their own affairs through the affliction of permanent disease; and hence, like them, were to be placed under guardianship. *Mente captis, et surdis, et mutis, et qui perpetuo morbo*

laborant, quia rebus suis superesse non possunt, curatores dandi sunt. (Digest, lib. i, tit. xxii, De Curatoribus, § 4.)

Degerando* observes that the Roman laws, before the time of Justinian, while they preserve an absolute silence with regard to the Deaf *and* Dumb, speak often of those who are deaf without being dumb, or dumb without being deaf; because, no doubt, persons thus afflicted, being able to manifest, either by speech or by writing, their intelligence and their wishes, still are unable to comply with the legal forms prescribed for those who both hear and speak, and therefore stand in need of exceptional provisions on the part of the lawgiver. Those who were both deaf and dumb were left, as we have already remarked, to be treated according to the discretion of the magistrate, in view of the intelligence they might manifest. The probability is, that the Code of Justinian did but reduce to express enactment and to the form of a general rule, what had previously been the usual practice.

The celebrated code in question furnishes, in its classification of the Deaf and the Dumb, a striking proof of the imperfect and erroneous notions then prevalent respecting Deaf Mutes. The legislator establishes five classes: 1. The Deaf and Dumb with whom this double infirmity is from birth: 2. The Deaf and Dumb with whom this double infirmity is *not* from birth, but the effect of an accident supervened in the course of life: 3. *The Deaf person who is not dumb, but whose deafness is from birth:* 4. The individual who is simply deaf, and that from accident: 5. Finally, he who is simply dumb, whether this infirmity be in him congenital, or the effect of an accident. It is hardly necessary, in this age, to observe that the third class existed only in the imagination of the legislator. To this point we shall again recur.

Different provisions were made to suit the cases of each of these five classes. We cite the original on the first class:

"Discretis surdo et muto, quia non semper hujusmodi vitia sibi concurrent, sancimus, si quis utroque morbo simul laboret, id est, neque audire, neque loqui possit et hoc ex ipsa natura habeat, neque testamentum facere, neque codicillos, neque fidei commissum relinquere, neque mortis causa donationem celebrare concedatur, nec libertatem, sive vindicta, sive alio modo impo-

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* De l'Education des Sourds—Muets de maissance, I. 24.

nere; sidem lege tam masculos quam feminas obedire imperantes." Code, lib. vi, tit. xxii, § 10.

Thus we see, that while the faculty of acquiring property, whether by inheritance or otherwise, was not denied to the Deaf and Dumb, they were debarred from that full control of their property conceded to other men. It appears, from the provision before cited, that they could only buy and sell by the aid of a *curator*, or guardian; and the law just cited denies to them the power of altering the descent of property, or of making a gift, even with the assistance of a curator, in any of the modes recognized by the Roman law. They could not make a will or a codicil; nor create a trust estate, nor make a donation contingent on the death of the donor, nor emancipate a slave. But to the second class, those, to wit, who were deaf and dumb by accident, all the rights were restored that were denied to the first class, provided they were able to manifest their wishes by writing.

"Ubi autem et hujusmodi vitii non naturalis, sive masculo, sive feminæ accidit calamitas, sed morbus postea superveniens et vocem abstulit et aures conclusit: si ponamus hujusmodi personam literas scientem; omnia quæ priori interdiximus, hæc ei sua manu scribenti permittimus."

It is worthy of remark, that only Deaf Mutes of this second class are supposed capable of receiving instruction. Cases, we cannot doubt, occurred in the Roman times, as well as in our own, in which persons who had learned to read and write in childhood, subsequently became deaf, and in consequence dumb. It was doubtless to meet such cases that the law before us was framed. But as in those times no cases were known of persons deaf and dumb from birth becoming able to read and write, (*litteras scientem,*) the legislator does not even provide for the possibility of one of this class receiving instruction in letters. It was then held, even by the wise and learned, that Deaf Mutes from birth were wholly incapable of instruction: indeed, the futility of attempting to instruct them seems to have become proverbial; and it may possibly have been considered by the authors of the Roman Code, that an exception of this kind in favor of this class of persons, might lead to attempts to pass their mere mechanical writing, from a copy before them, the

purport of which they knew not, for a valid expression of their own intelligent wishes.

It seems to us strange that the authors of this code should suppose the dumbness of Deaf Mutes to be a direct consequence of disease, and not, as we now know it to be, a mere consequence of deafness. "Sed morbus et vocem abstulit et aures conclusit." This supposition appears more prominently in the section of the law relative to the third class—those, to wit, who were supposed deaf from birth, yet able to speak.

"Sin autem infortunium discretum est, quod ita raro contingit; et surdis, licet naturaliter hujusmodi sensus variatus est, tamen omnia facere et in testamentis, et in codicillis, et in mortis causa donationibus, et in libertatibus, et in omnibus aliis permittibus. Si enim vox articulata ei a natura concessa est, nihil prohibet eum omnia qua voluerit facere."

Here the legislator supposes a class of persons who are deaf from birth, but who, notwithstanding, have received from Nature the gift of speech! He indeed adds that this rarely happens, (*quod ita raro contingit;*) but this mere legislating for a case which we now know cannot possibly occur, strikingly shows how wide of the truth were then the notions of even the learned and profound concerning the Deaf and Dumb. In vain had Pliny, (as the prince of Greek philosophers had done before him,) in a work of high reputation, distinctly stated, that "The man to whom the sense of hearing is denied, is deprived by that defect itself of the usage of speech; there is no person deaf from birth who is not also dumb."* The popular opinion that deafness and dumbness were distinct defects, usually, indeed, found united, but sometimes the one, even if from birth, existing without the other, is here found to influence the legislation of an empire embracing nearly all the then civilized world.

We cannot suppose the counselors of Justinian to have been ignorant of the fact, shown by constant experience, that children learn language from their elders, through the ear; but there seems to have been a prevalent idea, that not merely the faculty of learning to speak, but speech itself, was a gift of Nature, inherent in man as a reasonable being, and that, as the first men possessed language without having learned it from

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* Pliny, Hist. Nat. x. 69.

elders, as they had no elders; so children, whose organs of speech were not defective, might naturally possess speech, though they had never heard the speech of others. It is, however, remarkable, that the Roman lawgiver should suppose that this natural gift of speech would be the very speech of his own countrymen; else, supposing a deaf child to speak, how should it be understood? If it be supposed that children may speak without having heard the speech of others, it is obviously more natural to suppose, with the old Egyptian king, Psammetichus, that they would speak the language of some primitive race of men, than that they would speak a language intelligible to those around them.

This third regulation is terminated by an explication which is itself very curious. The lawgiver says: "Quia scimus quosdum jurisperitos, et hoc subtilius cogitasse, et nullum esse exposuisse, qui penitus non exaudiat, siquis supra cerebrum ejus loquatur, secundum quod Jubentio CELSO placuit."

From this we learn, that it was in those days held by some that all Deaf Mutes might be made to hear, (and it seems to have been assumed that to hear must be to understand,) by speaking to them in a certain manner over the top of the head. It is probable that, in many cases of partial deafness, this opinion was confirmed by experiment; but we may safely assert that, though persons who had become too deaf to distinguish words at the ordinary distance of conversation might recognize them when thus spoken, Deaf Mutes from birth—if they heard the words at all—would be sensible of only a confused noise. A contrivance that might enable a Deaf Mute, whose deafness was not total, to hear words, would no more enable him to understand them than a pair of spectacles, or the couching of a cataract, would enable one to read who had not previously learned to read. In some few cases of partial deafness, speech might, with pain and labor, be taught by often speaking to the Deaf Mute in the mode under consideration; and in a greater number of cases, it might enable the patient to guess tolerably well at words already known; but in far the greater number of cases, the degree of hearing thus procured, if any, would be much too feeble and indistinct, to be of use for instruction or conversation by vocal speech.

We are not to suppose, however, that the annexing this obser-

vation to the law before us, proceeded from an idea that some Deaf Mutes from birth could be taught to speak by speaking to them over the top of the head. Nothing of the kind, so far as we know, was ever accomplished, or even attempted, in Roman times. It is to be regarded as only the manifestation of another phase of the popular notions respecting speech. It is natural to believe that the furniture of the minds of our neighbors, and the texture of their thoughts, are like those of which we are ourselves conscious—as natural, and as erroneous, as to believe that the earth is at rest, while the heavenly bodies perform daily revolutions round it. Hence, as we are not conscious of reflecting and willing otherwise than by the aid of words, of an internal speech, we conclude that all rational beings must possess a like internal speech. And our Roman lawgiver, who so obviously makes the possession of verbal language a test of intelligence, supposed that this faculty of internal speech might, in cases where the ears are closed, be reached through the top of the head.

The general principle that runs through the provisions and mistakes of Justinian's code, evidently is, that there can be no valid contract made, or assent given, except by means of words, spoken or written. The Deaf Mute, who could only make his will known by gestures, was treated like a child, who might indeed buy and sell in the markets, but was interdicted from such grave acts as changing the descent of lands, or emancipating a slave. This *interdiction* is repeated later in the Institutes: "Item surdus et mutus non semper testamentum facere possunt; utique autem de eo surdo loquimur, qui omnino non exaudit, non qui tarde exaudit; nam et mutus is intelligitur, qui eloqui nihil potest, non qui tarde loquitur. Sæpe enim literati et eruditi homines variis casibus et audiendi et loquendi facultatem amittunt. Unde nostra constitutio etiam his subvenit, ut certis casis et modis secundum normam ejus possint testari aliaque facere, quæ eis permissa sunt."*

Under the reign of a code of laws so precise and formal, some special provision would have been necessary to give legal effect to the wishes of those who, though profoundly deaf, were still able to speak intelligibly, but not to write.

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* Instit. lib. ii, tit. xii, *quibus non est perm. fac.* test.

Disqualifications similar to those of the Code of Justinian were established by the laws of the feudal monarchies of Europe; and in some cases they even went beyond the Romans, by declaring a deaf and dumb person incapable of succeeding to a fief, or other inheritance. The Code of Justinian did not debar a Deaf Mute from the succession, nominally at least, to an inheritance, but only incapacitated him from changing the descent, so that it passed to the next legal heir at his death; but the codes or customs of some mediœval realms of Europe (like the Hindoo Code) set aside the Deaf Mute altogether, and vested the inheritance in the next heir at once. Yet, we remark, with some surprise, that Carpzovius, in his *Definitiones Forensas ad Constitutiones Electorales Saxonicas*, etc. (1663,) after laying down the *definition*, "Mutus et Surdus vel aliter imperfectus in feudo non succedit," adds, "De feudo tamen novo mutum et surdum vel aliter imperfectum Dominus bene investire potest." It is easy to see why a Deaf Mute should be judged incapable of succeeding to a fief, the holder of which was not only bound to military service as a leader of troops, but was usually in his own territories a civil and criminal judge; but we should suppose the same reasons would oppose the conferring a new fief on a person in that condition. The contradiction may, perhaps, be reconciled, by supposing that the former was the general rule, and the latter designed to operate as a rare exception in favor of Deaf Mutes of noble race, who may have displayed an intelligence greater than is usual in persons so afflicted; but this exclusion of Deaf Mutes from certain rights of inheritance does not appear to have been general, else the provisions to prevent this class of persons from alienating property, would have been nearly if not quite supererogatory.

Having thus passed in review all that we have found in ancient jurisprudence respecting the Deaf and Dumb, we will now turn our attention to the light in which they have been viewed under the common law of England. The Roman civil law is still of great authority in Continental Europe, and the foundation of most of their present codes; but the common law of England is a distinct and different system, lying at or constituting the foundation of the jurisprudence of England and of the United States.

In the treatise of Glanville, supposed to be the first elemen-

tary work on the common law, written in the reign of Henry II., towards the close of the twelfth century, nothing is said respecting the legal rights, disqualifications or responsibilities of the Deaf and Dumb. Though this work is but a very loose and general summary of the law of England, as it then existed, it is presumed that the law made no provisions respecting this class of persons; for in the Norman Code, which, after the Conquest, made part and parcel of the law of England, but four impediments to the succession of heirs are recognized—Bastardy, Profession of Religion, Forfeiture, and incurable Leprosy. (Le Grand Custum de Norm. 27.) Nearly a century after Glanville, in the reign of Henry III., appeared the more elaborate and learned work of Bracton on the Laws and Customs of England; and, in this treatise, the Deaf and Dumb are referred to as a class of persons who are not entitled to the same rights and privileges as other subjects. It would appear from Bracton, that they could not inherit as heirs, or participate in the inheritance. (Bracton, lib. v, De Exceptionibus, cap. 26, § 3, fol. 430; cap. 20, § 2, fol. 421.) He draws a distinction, however, between those who are Deaf and Dumb from birth, and those who have become so through accident or other cause, after having had the use of their natural faculties; and he says, that those who can hear, though with difficulty, and those who have merely some impediment of speech, are not to be considered as under the legal disabilities existing in the case of the Deaf and Dumb from birth. Those, he says, who are naturally Deaf and Dumb cannot acquire any thing, or enter into any obligation or contract; for as they cannot hear what is said to them, or express their will, they cannot give their consent to anything. Those, however, who have been able to hear or speak, but have lost the power by accident, sickness or other cause, he places in a very different position. In their case, he says, it is to be ascertained who or what they were before the misfortune came upon them; because if they could speak and hear, and give consent at the beginning, they retain all the acquisitions (property) they may have acquired, and may continue to acquire through their guardians, to be appointed; but should not be allowed, without great care and caution, to grant or transfer to another what they possess. And he then declares, that an inquiry must be instituted by the court, for the purpose of ascertaining and determining

what shall be necessary for maintaining such persons, according to their quality and the quantity of their estate.

We will give the principal passage upon the subject from Bracton in his own words, which will be the more interesting, as it shows that the law did not at that time admit, or rather it denied, the possibility of the Deaf and Dumb expressing their will or consent, even by signs; a state of things not remarkable, when it is remembered that the learned Spaniard Vives, nearly two centuries later, questioned, merely from the inherent incredibility of the thing in his view, the statement of the Heidelburg Professor Agricola, that he had seen a young man, born Deaf and Dumb, who had learned to understand writing, and to note down his whole thought. (De Anima of Vives, lib. ii, cap. De Discendi Ratione, and see De Inventione Dialecticæ of Agricola, lib. iii.) The passage from Bracton is as follows:

"Competet autem tenenti exceptio peremptoria ex persona petentis, propter defectum naturæ; ut si quis fuerit surdus et mutus naturaliter, si quis omnino loqui non possit nec audire, non tamen si tarde audiat, vel loqui fuerit aliquantulum impeditus. Et talis cum naturaliter surdus fuerit et mutus, acquirere non potest omnino, et cum omnino audire non possit nec omnino loqui, voluntate et consensum exprimere non potest, nec verbis, *nec signis.* Naturaliter dico, hoc est a nativitate, sicut dicitur de cæco, qui cæcus fuit a nativitate, quia si hoc aliter alicui evenerit a casu, inquirendum erit qualis fuerit antè hujusmodi infortunium, quia si loqui potuit ab initio, et audire et consentire, per se et per procuratorem acquiret, et acquisita retinet, sed tamen de facili non transfert ad alium acquisita sed cum surdus et mutus naturaliter acquirere non possit, per officium judicis invenienda sunt ei necessaria quoad vixerit, pro qualitate personæ, et hæreditatis quantitate, si hæres esse debuit, et si semel autoritate curatoris acquisieret, si fuerit inde ejectus recuperabit per assisam, sicut minor."

Bracton had carefully studied the Code of Justinian, and it is a striking proof of his intelligence and observation in that early age, that he adopts but two of the classifications of the Roman lawyers, viz: those with whom this infirmity is from birth, and those with whom it is *not* from birth, but the effects of an accident supervened in the course of life. He does not repeat the absurdity of the Roman Code—of the possibility of the faculty

of speech in those who continue deaf from birth; nor class as disqualified persons those who are merely deaf, or those who are only dumb—an omission not accidental; for a great part of Bracton's work is a mere transcript of Justinian, word for word. His rejection, therefore, of the three last classifications of the Roman lawgiver, was evidently deliberate and designed. He speaks invariably of those who are both Deaf and Dumb, and is careful to point out that a person is not to be included in that class, because he has a difficulty in hearing, or an impediment in his speech.

In the next reign, that of Edward I., appeared the work denominated Fleta, which was a mere appendage to Bracton. The writer of this treatise, who is unkown, for it takes its name from a fact stated in the preface, that it was composed in the Fleet prison, puts the Deaf and Dumb from birth in one general classification with natural fools, the mad, and those who are afflicted with general leprosy; and refers to them as an entire or whole class, who, from their natural defect, cannot acquire nor alienate, because they cannot give a legal consent; but who, from their inability to manage their own affairs, may have guardians appointed over them, and may acquire property by their guardian; but the guardian, it seems, had no power to alienate the estate or property of such wards. "Competit etiam exceptio tenenti propter defectum naturæ petentis, vel si naturaliter a nativitate surdus fuerit, aut mutus, tales enim adquirere non poterunt nec alienare, quia non consentire, quod non est de tarde mutis vel surdis, quibus dandi sunt curatores et tutores cum ex casu talis ægritudinis de rebus propriis disponere nesciverunt, et tales per procuratores adquirere poterunt, sed non legitime alienare." (Fleta, lib. vi, cap. 40, § 2.)

As the feudal law stood in the time of Bracton and Fleta, the custody of idiots, under which were included the Deaf and Dumb from birth, or those who became deaf and dumb in the course of life, was given to their feudal lords; that is, where they had landed property, the guardianship of their person and the possession of the estate was vested in their lord, the title or fee remained in them until their death, and passed at their death to the next heir in the order of succession; but during their lifetime the possession of their estate, as well as of all lands or hereditaments which might come to them during their lives

by purchase or descent, was vested in the lord of the fee as their legal guardian. In consideration of the enjoyment of their estate, he was obliged to support them according to their quality and the quantity of their property; but beyond what was necessary to maintain them, which was ascertained by a judicial inquisition, the rents and profits of their estate during their lifetime went to and were enjoyed by him as his exclusive perquisite or right. (Fleta, lib. i, c. 11, § 10; Dyer, 302; Huit, 17; Noy, 27.)

Apart from the injustice of giving to the feudal proprietor or lord paramount all the benefits and profits of the estates of those who were disabled from taking charge of them, except what was necessary for the support of his ward, this regulation led to a serious train of abuses. It held out to those grasping and unscrupulous proprietors the temptation to possess themselves of estates upon the presumed want of capacity in the natural heirs; and though the law required that the want of natural capacity should be determined by a judicial investigation, this precautionary measure proved inadequate to restrain the powerful barons from obtaining the control of estates upon slight and insufficient grounds. Not only was this the case, but the estates were shamefully mismanaged, injured in value, or prodigally wasted; it being an object with these temporary possessors to get out of the estate as much as they could while they had the control. These abuses went on uncorrected, until a monarch came upon the throne who had both the will and the capacity to cope with these feudal tyrants, and restrain them in their course of oppression and injustice. Among the many reforms which distinguished the important reign of Edward I, was the passage of a law abolishing this feudal privilege, and making it a part of the king's prerogative to have the custody of the estates of those who, from want of natural capacity, were incapable of managing them. From a passage in Britton, cap. 16, Beverly's case, 4 Coke, 125, this may have been originally the common law; and the right of possessing themselves of such estates may have been an assumption and encroachment on the part of the barons, like many of the feudal privileges which they claimed, and had the power to enforce in that age of baronial supremacy. But the remarks about it in Fleta, (lib. 6, § 10,) indicate that this statute was

an organic change in the law, and not merely declaratory of it. That it was administered with uprightness and vigor, is to be assumed from the manner in which the laws were maintained and enforced during the reign of this powerful, vigilant and energetic monarch. Whether it had fallen into disuse during this turbulent reign of his feeble successor, or whether its provisions were not regarded as sufficiently explicit, we are unable to say, as the statute is now lost; but in the reign of Edward III, a new law was passed, declaring that the king should have the custody of the lands of natural fools, taking the profit of them without waste or destruction, and should find them in necessaries; and that after the death of such idiot, he should render the lands to the right heirs, and that they should not alien their lands, nor should their heirs be disinherited. (17 Edw. III, stat. i, c. 8.) Lord Coke, in interpreting this statute, declared that it applied only in the case of idiots *a nativitate*, (Beverly's case, 4 Coke, 127.) It has been shown by the quotation from Fleta, that the Deaf and Dumb from birth were regarded by the law as idiots; and had the law continued so to regard them, without qualification or exception, it would have been productive of endless absurdities, and led in many instances to the grossest injustice. But it is one of the chief excellencies of the common law, that unlike the Roman civil law, it is not a positive code of definitions, but adapts itself to the progress of knowledge, rejecting any absurdity that has grown out of the ignorance of the past, and recognizing as its principle and practice whatever becomes apparent in a more enlightened condition of society.

How loosely the common law, or the expounders of it, defined, even two centuries later, what was understood in law as an *idiot*, will appear from Fitzherbert's Natura Brevium, written in the reign of Henry VIII. An idiot, says this writer is one that "cannot number twenty pence, or tell who was his father or mother, or how old he is, &c., so that it may appear that he hath no understanding or reason what shall be for his profit or his loss. But if he have such understanding that he knows and understands his letters, and can read by teaching or information of another man, then it seemeth he is not a sot nor a natural idiot." (F.—N. B. 233, B.) A definition which Lord Tenterden characterized as absurd, or repugnant to com-

mon sense; "for," said that eminent judge, "as to repeating the letters of the alphabet, or reading what is set before him, a child of three years may do that." (1 Dow. P. C. New Series, 392; S. C. 3 Bligh, New Series.) Even under Fitzherbert's definition, an educated Mute, in that age, would not have been an idiot. But such definitions were of no practical consequence, for it was wisely ordained by the common law that the question whether or not a man was to be adjudged an idiot, was a question of fact, to be determined by a jury, not according to legal definitions, but as they found the fact to be upon the testimony laid before them; and no man could be deprived of his property or of the common rights and privileges of a subject upon that ground, unless upon "*offices found*," as the old legal phrase is. (Dyer, 25; Moor, 4, pl. 11; Bacon's Abs. 5; Idiot, B.; Skin. 5, 178.)

That the Deaf and Dumb from birth were deemed incapable of giving their consent to any act, and that acts done by them while under this infirmity, such as granting or conveying any interest in their real estate were void, was up to this period the recognized rule of law, has been shown by the writers referred to. But in the very reign in which Fitzherbert wrote, the law upon this point seems to have been questioned. In the thirty-sixth year of Henry VIII, a case occurred in which a son sought to avoid a conveyance of land made by his father, upon the ground that his father, in the language of the report, (*Young* v. *Sant*, Dyer, 56, a.) was "from the time of his birth until the day of his death, deaf and dumb, and being so deaf and dumb, made a charter of feoffment of the land, which charter he sealed and delivered upon the land, to the defendant. The son accordingly brought an action of trespass against the defendant for entering upon the land; and the defendant *demurred;* that is, denied that the son had any ground of action against him, or had any right to the property. What decision was come to by the court upon the interposition of this demurrer,—whether they held that the defendant had acquired a lawful right to the land under the instrument which the Deaf and Dumb owner of it had sealed and delivered to the defendant,—or whether the son was entitled to the property by reason of his father's incapacity to make such a deed of conveyance, does not appear from the report; but the case is referred to,

to show that the law was not at that time taken for granted, but was at least doubtful or unsettled. This state of uncertainty seems to have existed during the reigns of Elizabeth and James I; for Lord Coke admits that it was the opinion of some, that this class of persons might express their *consent by signs*. "One," he says, that is deaf and wholly deprived of his hearing cannot give, and so one that is dumb and cannot speak. Yet (according to the opinion of some,) they may consent by signs; but it is generally held that he that is dumb cannot make a gift, because he cannot consent to it. (1 Just. 107.)

In the reign of Charles II, however, a case arose in which the question came directly before the court for decision; whether a person born dumb and deaf could transfer an interest in lands, and give a valid consent to the transfer by signs. We will give the case as it appears in Carter's Reports, (Martha Elyot's case, p. 53.) The Chief Justice, Bridgman, reported that a woman came before him to levy a fine, (one of the modes of transferring estates of freehold by the common law,) and he gave to the court the following statement: She and her three sisters have a house and land. An uncle hath maintained and taken great care of her, and he is to buy the house and land of them, and he agrees to mantain her, if she will pass her lands for security. As of her intelligence, the sisters say she knows and understands the meaning of all this. I demanded what sign she would make for passing away her lands, and as it was interpreted to me, she put her hands that way, where the lands lay, and spread out her hands. It being a business of the court, and for her own good I thought fit to communicate it to you. He then referred to the case of one Hill, who was born deaf and dumb, and was brought before Justice Warburton to levy a fine, but the judge would do nothing until he had acquainted his brethren. Hill was examined, and being found intelligent, Judge W. took the fine. Upon this report being made to the court by C. J. Bridgman, Archer, one of the Justices, said the rule of law is that in fines and feoffments, (the usual mode at that time, of conveying an interest in land,) if there is good intelligence, they (Mutes) may do such acts. They may be admitted to make contracts for their good. They are admitted, upon examination, to marry and receive the sacraments. They may make contracts for their persons, why not for their estates? I conceive that it may be

done, and that your lordship may take the fine. The other two judges, Tirrel and Brown, agreed, and the fine was accordingly taken.

When this case occurred, the successful efforts that had been made during the century preceding, in different parts of Europe to instruct the Deaf and Dumb and improve their condition, had been brought before the English public. Half a century had elapsed since Sir Kenelm Digby, and the other companions of Charles I, in his romantic journey into Spain, had brought back reports of the marvelous success of Ponce and Bonet in teaching Deaf-Mute nobles of the great house of Velasco. At the time of this decision, Drs. Bulwer and Wallis, the latter a practical teacher, and a man eminent in almost all kinds of learning, were then living. Wallis had exhibited his pupil, Daniel Whalley, before the Royal Society more than ten years previously. Whalley, indeed, was not deaf from birth, but others of Dr. Wallis's pupils were. Dr. Bulwer's "Philocophus, or the Deaf and Dumb Man's Friend," had been published more than twenty years. Holder had also published his "Elements of Speech, with an Appendix concerning persons Deaf and Dumb," in which he gave an account of the method he employed, as early as 1659, in the education of a Deaf and Dumb person. And shortly before the decision now in question, that is in 1670, a letter of Wallis, detailing his methods of instruction, had appeared in the Philoscphical Transactions, and in the same year George Sibscota published his little work entitled the "Deaf and Dumb Man's Discourse." Light was breaking at several distinct points out of the night of darkness that had so long involved the Deaf and Dumb. To these works, as well as to the personal efforts of those English philanthropists, the credit is no doubt due for a more enlightened view on the part of the court of the legal rights and responsibilities of this class of persons.

In this connection we will refer to a subsequent case which appears to be the earliest English adjudication upon the right of those born deaf and dumb to have the possession, enjoyment and management of their real and personal property, where it appears to the court that they have the requisite intelligence.

In 1754, a woman born deaf and dumb, upon arriving at the age of 21 years, applied to the Court of Chancery for the possession of her real estate, and for the enjoyment of her personal

estate, (it is presumed that she had been previously under the control of a guardian.) Upon her appearing before the Chancellor, Lord Hardwicke, he put questions to her in writing, and receiving suitable answers to them in writing, he ordered her application to be granted. (*Dickinson* v. *Blisset*, 1 Dickens, 168.)

After the passage of the statute of Edward III, referred to on a previous page, it became usual for the king to grant the custody of the estates of idiots to some person, who thereby became entitled to the same privileges and powers which the king enjoyed under the statute, that is, the possession of the estate, and the enjoyment of the rents and profits upon the condition of supporting the idiot. These grants, which were made for a *bonus* or consideration, became and continued for centuries to be one of the sources of the royal revenue; and the power thus conferred upon these grantees or guardians, came in time to operate injuriously upon such estates, as the guardianship of the feudal barons had formerly done. (4 Inst. 203.) So great was the hardship upon private families, that in the reign of James I, it was proposed to vest the custody in the relatives of the party, and settle an equivalent upon the crown in place of it. But an abuse which yielded so much revenue to the crown was not easy of removal, and it remained uncorrected till the breaking out of the revolution of 1640, since which time the crown has always granted the surplus profits of an idiot's estate to some of his family. (1 Ridley P. C. 519.) From the time of Henry VIII, the administration of such estates was vested in a Court of Wards. This court was abolished in the reign of Charles II, and its authority over such matters then vested in the Court of Chancery. And the right of directing the control and administration of such estates has, in England, remained in the Court of Chancery until the present time. Whether or not a man is an idiot, incapable of managing his affairs, is ascertained by a writ, *de idiotâ inquirendo*, which must be tried by a jury of twelve men. To prevent abuse, the finding may be reviewed in the Court of Chancery, and the alleged idiot brought before the Chancellor for inspection, who if he is not satisfied that the finding is correct, may discharge the whole proceeding. If he is satisfied of its correctness, he appoints a person to take charge and manage the estate, who acts always under the supervision and control of the Chancellor.

In this country this power is most usually vested in the courts of equity, and though there are different regulations in different States, the general mode of proceeding is essentially the same as in England.

The result of this examination of English common law, as the foundation of American law, is, that the Deaf and Dumb have ever possessed the same rights of inheritance as those who are not deaf and dumb: and, like the latter, are restricted in the full enjoyment of such rights only upon proof of the want of the requisite intelligence. This, also, we believe, is the case throughout Europe; the old feudal codes having mostly passed away. As to what would be deemed satisfactory proof of the requisite intelligence, there is evidently room for much diversity of opinion; and different decisions may be given in similar cases, according to the degree of intelligence and freedom from prejudice of the judge or jury. In such cases, indeed, the intelligence of the judge has often more to do with the decision than the intelligence of the Deaf Mute.

We will next consider whether a Deaf Mute can make a valid will. Evidently, a person deprived of the control of his property during his lifetime, cannot consistently be permitted to alienate it from the legal heirs at his death. The Roman law on this point we have already cited. The English law would decide this question according to the actual intelligence manifested. Other European codes, more influenced by the spirit of the Roman law, exact formalities which only Deaf Mutes able to write can comply with. In France, a Deaf Mute able to read and write, is admitted on all hands to be competent to make a valid will, writing, signing and dating it with his own hand, conforming in this to the spirit of the Roman law, and avoiding the ignorant exclusion of Deaf Mutes from birth from the possibility of education. It is required, however, that "the judges should have positive proofs that the Deaf Mute testator had exact notions of the nature and effects of a testament; that reading was in him not merely an operation of the eyes, but also an operation of the understanding, giving a sense to the written characters, and acquiring by them knowledge of the ideas of another; that writing was the manifestation of his own thoughts; that, on the whole, the testamentary dispositions were such as showed the

effect of an intelligent will—and these proofs are at the charge of the person to whose benefit the will is made."*

From this statement, taken from a standard French work, it appears that, whereas in ordinary cases, every person of lawful age is considered competent to make a will till the contrary is proved, a Deaf Mute, on the other hand, is considered incompetent till his competency is proved.

Piroux records a case in which the holograph will of a Deaf Mute, Theresa Charlotte Lange, was, in August, 1838, annulled by the Tribunal of Saint Jean d'Angely, on the ground that, though it was not contested that the will was written by the own hand of the testatrix, yet there was no evidence that she could use writing to express her own ideas, but, on the contrary, evidence that she could only express herself by signs. As this case was an important one, and seems to have been argued at much length, and carefully considered by the court, we will give an abstract of the points in which the judgment was founded:†

"The heirs have not denied that the characters which compose the material body of the document purporting to be the testament of Theresa Charlotte Lange were the work of her hand, but maintained that they could not be the work of her intelligence; hence that there was no occasion for a verification of the hand-writing, or for enquiring at whose charge such verification should be.

"No provision of law places the Deaf Mute in any exceptional case as to the capacity of making a will; he possesses the common rights of other men; and therefore can, like the generality of citizens, bequeath or give away property, provided he complies with the formalities exacted by law.

"If, in consequence of his infirmity, he cannot make a will by *acte publique*,‡ he cannot, at least, when he knows how to write,

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*Piroux' Journal, *L'ami des Sourds-Muets*, tome 1, p. 5, taken from *Le Dictionnaire de Legislation usuelle*, published in 1835 by M. Chabrol Chaméane.

†Piroux' Journal, tome i, p. 109-112. We have, in making the translation here given, omitted the legal *attendu que*, which in the original begins each paragraph.

‡Dictating the provisions of a will publicly, in the presence of witnesses, to a notary public, who, after writing it down from this dictation, reads it to the testator, and attests his signature and acknowledgment. The French Code re-

when he can manifest his will in an unequivocal manner, contest his ability to make a holographic or a *mystique* testament; this is a point on which there is now no difficulty.

"To be valid, the holographic testament must be written, dated and signed by the hand of the testator.

"In ordinary language, and in the strict acceptation of the term, it is true that to write may be understood to trace on paper letters or characters, no regard being had to their signification.

"But in the eyes of the law, and in its more extended acceptation, this expression has a very different sense; and it is evident that in a matter of such importance as making a will, to *write* most evidently cannot be understood of the purely mechanical act which consists in copying, instinctively or by imitation, characters that have been placed before one's eyes, and of which the copier does not know the use or meaning; that to know how to write is to be able at once to conceive, collect, arrange one's thoughts, put them in form and express them on paper by means of certain conventional characters; and consequently, it is much more an operation of the mind, a work of the intelligence, than a labor of the hand.

"Whence it follows, that to know how to *write* in the true acceptation of the word, it is indispensable to know the significations of words, to comprehend the relations which they have, the objects and ideas which they represent; that thus to establish that an individual knows or knew how to write, it is not enough to produce a sample of characters placed one after another; this would only prove that he had been habituated to figure letters, or to draw; but it is necessary to prove that he has received, whether in a public institution or by the care of capable persons, the education necessary to attain this result; this is above all true when the question is of a Deaf Mute from birth, who, deprived of two organs, so essential as hearing and speech, whatever natural genius and capacity he might have

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quires that the testator should dictate the provisions of the will *viva voce*, and should *hear* it read; expressions which, if taken literally, would preclude all Deaf and Dumb, or even merely Deaf persons, from this mode of making a will, a mode evidently designed to assure certainty in drawing up the wills of illiterate persons. Some respectable lawyers, however, argue that the *spirit* of the law would be complied with by dictating and reading in signs.

otherwise, has so many difficulties to overcome in order to develop, or rather to form, to re-temper his intelligence.

"When such a proof becomes necessary, it is without doubt incumbent on the party who would have the benefit of a writing attributed to a Deaf Mute; in this matter the general rule is, the state in which nature has placed the individual afflicted with dumbness and deafness; the exception is, the modification or amelioration wrought in that state: the presumption of law is, that the Deaf Mute is illiterate, and the fact to be proved, that he has been brought out of his ignorance by education—which is consequently to be proved by him who alleges this fact, or claims the exception.

"Therese Charlotte Lange was born deaf and dumb. Nothing offered in evidence shows her to have been, whether in youth or at a more advanced age, placed in an establishment consecrated to the special education of those unfortunate persons afflicted like her with this double and deplorable infirmity. It is alleged, indeed, that on her arrival in France, she was, as well as her sister Rose, also deaf and dumb from birth, received by the Abbé Hardy, then vicar-general of the bishoprick of Saintes, and that this ecclesiastic, devoting himself wholly to the care of their education, had taught them to read and to write; but no proof of this fact is to be found in the documents produced in the case: the only piece which has been adduced in support of these allegations, the *acte* of 19th September, 1789, far from justifying them, seems to prove the contrary.

"In effect it results from this *acte*, that one of the ancestors of the plaintiffs had wished at that time to withdraw the demoiselles Rose and Charlotte Lange from under the guardianship of the Vicar Hardy, in order that they should, as he said, re-enter the bosom of their family; and it was only by gestures and signs that Therese Charlotte, particularly, manifested her opposition, and her refusal to adhere to the demand of the Sieur D. F. Desportes. Four witnesses, whose communications with the demoiselles Lange were frequent, were on this occasion called in to assist at this declaration in mimic language, and to interpret the signs by which they made known their resolutions; all these circumstances are such as to give a strong suspicion, in spite of the physical fact (*fait materiel*) of the apposition of the signature of Charlotte Lange at the bottom of the protestation, which

was written, as is mentioned in the *acte* itself, by Rose Lange—that signs were the only means she knew to manifest her will or wishes.

"From this epoch to that of her marriage in 1821, nothing is shown which could tend to invalidate this conclusion. If it is alleged that she had a great facility to divine the signs addressed to her, and to make herself understood by means of gestures by those with whom she was habituated to communicate, that fact may prove that by a just compensation, nature had endowed her with a remarkable instinct and penetration, but not destroy the presumptions, weighty, precise and consistent, which result from the other circumstances of the case; because these presumptions are yet farther justified by the fact that she appears to have made no use of writing, which ought, however, to have been one of the easiest and surest means of communication with her relatives and friends.

"These presumptions, already so strong, become certain proofs when, in the most solemn circumstance of her life, at the epoch of her marriage with the Sieur Hardy in 1821, we see Therese Charlotte, in order to accomplish this marriage, forced on one part to have recourse to the *Garde des Sceaux* (Keeper of the Seals,) to obtain an authorization to this effect, because of the impossibility in which she found herself to express her consent; and on the other side, obliged to employ an interpreter to transmit to the public officer the consent which she gave as is mentioned in the *acte civile*, (the civil part of the contract of marriage) *by signs*, showing her intelligence by conversation on all sorts of subjects, when it had been so easy for her to avoid all these difficulties by giving her consent in writing, if in fact she knew how to write.

"Hence there can be no doubt that at the epoch of her marriage with the Sieur Hardy, Charlotte Lange, then aged sixty-five years, did not know how to write, and it is difficult to admit that she could have learned since; moreover no proof has been offered on that point."

"It must be concluded, from all these facts, that evidently, if the *acte* called her testament, materially emanated from her, it is not the work of her intelligence, and that, in this point of view, it cannot be valid in the eye of the law."

The testament dated 7th August, 1834, and enregistered 8th

August, 1836, was accordingly declared null. The plaintiffs, M. M. Desportes, having offered a *liberality* of 12,000 francs to the defendant and legatee Hardy, the latter acquiesced in the judgment; a fact that induces a suspicion that the decision of the court was not considered altogether conclusive, and that there was some possibility of a different ruling by a higher tribunal; or at least doubt enough to encourage the defendant to prosecute an appeal, if not bought off.

The reader will observe that, in this case, the general intelligence of Therese Charlotte Lange, and her competency to make her wishes distinctly known by signs, were not called in question. The only question was whether she could read and write with sufficient understanding to write her own will, with a full knowledge of its provisions and their effect. In this point of view, we are not prepared to dispute that the decision of the court was correct. It is probable, from the facts shown in the case, that though Therese Charlotte might have had some idea of the meaning of simple sentences, those about her and possessing her confidence, might have placed almost any instrument before her to copy as her own; she would have had to rely on their interpretation in signs for its purport.*

We have, however, to object to the reasoning of the judgment before us on one or two points. It is by no means true that a Deaf Mute who has been taught to read and write, however expert he may be, finds writing "the easiest and surest means of communication with his relatives and friends." In most cases, on the contrary, the relatives and friends of an educated Deaf Mute find it much easier to learn to communicate with him by signs, than to suffer the tediousness and other inconveniences of having to write every communication. And there are few Deaf Mutes from birth, however well educated, who do not understand signs skilfully made, more easily and readily than writing.

We may further remark that a Deaf Mute who uses written language so imperfectly that he prefers to express himself by

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* It is, however, to be observed that illiterate people generally have but a confused idea of the meaning and force of legal phraseology, and are about as much dependant as a half-educated Deaf Mute on the integrity of their men of business.

signs, may yet have a fair idea of the meaning of what he reads or copies. Whether this last was the case with Charlotte Lange, the evidence before us does not show.

Under this decision, and others of the same tenor, it seems that, in France, an uneducated or imperfectly educated Deaf Mute cannot make a valid will at all. As it is certain that there are some uneducated, and many partially educated, Deaf Mutes who are perfectly competent to manage their own affairs, and as fully aware of the nature and effects of a testament as illiterate speaking persons generally are, it must be considered as a defect of the law, if they are, by consequence of the formalities exacted, precluded from disposing by will of property perhaps acquired by their own industry. The reason given by Pothier, that "signs are too equivocal to authorize the declaring one's last will in this mode," is, as the distinguished Deaf-Mute Professor Berthier well observes, very contrary to the fact, so far at least as concerns the signs used by Deaf Mutes of fair intelligence, who have been accustomed to communicate freely, like Charlotte Lange, with those around them. Berthier has, with equal zeal and ability, repeatedly brought this and other points on which he conceives injustice has been done to his unfortunate brethren, to the notice of the French Legislature. If he has failed to obtain a modification of the code in their favor, it seems to have been not so much from any want of appreciation of the justice of his complaints, as because more liberal principles of interpretation were beginning to prevail in the French courts, by which the necessity of special legislation is probably superseded.

The evidence of this change of views among French jurisconsults is found in a case recorded in Morels' "Annales des Sourds-Muets et des Avengles," tome i. (1844,) pp. 164–179: "The Sieur Clergue, Deaf Mute, not knowing how either to read or write, appeared (in 1835) before M. Dubosq, notary, *assisted* by his mother and his niece, and in presence of several witnesses, who, by their relations with the Deaf Mute, were able to understand his signs. He declared in a language understood by all present, that he gave the ownership of all his property to the Sieur Pierre Clergue, his nephew, on condition that the latter should provide for all his necessities during his life. The *acte* drawn up by the notary was read to those present, and explained in mimic lan-

guage to the Sieur Clergue, who manifested, by very intelligible signs, that the notary had faithfully expressed his mind."

"After the death of the Sieur Clergue, in 1839, his heirs attacked the donation, as emanating from an incapable person. They founded their case principally on this, that a Deaf Mute, who does not know how to read and write, not being permitted, by the terms of the French Civil Code, (article 936,) to accept a donation without the assistance of a *curateur*,* should have, *a fortiori*, need of this assistance to express his own consent to a donation of his property." To which it was replied, that it was easier to know what one gives, than to understand what one binds one's-self to in accepting a donation; that the rule of the code was not designed as a rule of capacity, but for the advantage of the Deaf and Dumb, enabling all to accept donations, and leaving those who possessed sufficient intelligence to make them.

The case was carried from court to court, till it reached the court of the last resort, the *Cour de Cassation;* and by each tribunal before which it was taken, the donation was sustained. The grounds of this decision were mainly these:

"In general, every person can make a contract, unless expressly incapacited by law; incapacities should be strictly construed, and were not to be extended beyond the letter of the law." The authors of the civil code (following, according to their published debates, the expressed opinion of the First Consul himself on that point,) had expressly refused to deny the faculty of contracting marriage to Deaf Mutes, even if illiterate, leaving the tribunals to judge from their signs, whether they possessed the degree of intelligence necessary to a valid consent, and had expressed such a consent; and this faculty of contracting marriage involves the very principle in question in this case, that of making a donation *inter vivos*, (a gift of one's property in one's lifetime.) Since the success that has attended the efforts to educate them, Deaf Mutes can no longer be considered, as they are by the Roman Code, as being generally wanting in the intelligence necessary for managing their own affairs; the facts and circumstances proved that the Deaf Mute Clergue had the

* The acceptance of a formal donation, on account of the onerous conditions sometimes annexed, requires caution and intelligence in the donee.

capacity necessary for making a contract, and that he could put himself in communication with the notary and the *assistants*, (those present,) in such a manner as to leave no doubt of his intentions or of his will.

It is evident, that if a Deaf Mute has the capacity to make a valid donation of his property in his lifetime, by an instrument drawn up from his signs, and acknowledged by him by means of signs, he must be equally capable of making a will in some similar mode. Granting him the former capacity, it must be absurd to refuse him the latter. The difficulties are merely matters of form, which will doubtless be got over, when the principle is once admitted.

In English and American laws, the distinctions of the French law between the different sorts of wills (the *testament olograph*, the *testament par acte publique*, &c.) do not exist. The circumstance of a will being written wholly by the testator's own hand, does not make it valid, if the required forms of attestation before the legal number of witnesses were not complied with. The Surrogate of New York observes: "No particular form is requisite; all that the law requires is, that the testator shall communicate to the witnesses that it is his will, and that he desires them to attest it. This can be done by reading and other acts performed by a third person, provided an intelligent assent on the part of the testator be shown. Indeed, not a word need of necessity be *said. A Deaf Mute might go through all the ceremony by means of a written communication.*"* Of course, this refers only to the case of a Deaf Mute able to read and write.

We have not been fortunate enough to find any English or American case in which the validity of a will, made by a Deaf Mute, came in direct question; but opinions bearing upon the point before us, have been incidentally put forth by the very eminent jurist, Surrogate Bradford, of New York, whom we have just cited. He declared, (in *Wier* v. *Fitzgerald*, 2 Bradford's Reports, 42,) that the law does not prohibit a deaf, dumb or blind person from making a will; that the defects of the senses do not incapacitate, if the testator possesses sufficient mind to

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* Bradford's Reports, 265.

perform a valid testamentary act; and after reviewing the provisions in the Code of Justinian, and the rule as stated by Blackstone,* that those born deaf, dumb and blind are incapable of having *animum testandi*, and that their testaments are void, as they have always wanted the common inlet of understanding; he says that this rule was necessarily qualified by the reason of it, which was a *presumed* want of capacity; and, of course, in any case where it appears as matter-of-fact that there was sufficient capacity, the reason of the rule no longer applies.

We have, however, a direct adjudication upon the kindred question, whether an uneducated Deaf Mute can make a valid deed or conveyance of real estate. In *Brower* v. *Fisher*, (4 Johnson's New York Chancery Reports, 441,) a deed was declared valid that had been made by an uneducated Deaf Mute; it being shown on enquiry, by a commission of lunacy, that the grantor, though born deaf and dumb, "had sufficient intelligence for the management of himself and property, and was capable of communicating, by signs and motions, with persons with whom he was intimate, so as to be well understood and of understanding them; that the jurors were of opinion that the defendant was not a lunatic, unless the fact of his having been born deaf and dumb, in judgment of law made him a lunatic." The Deaf Mute had sold his interest in his father's estate to the plaintiff for $375, which was proved to be a fair compensation under the circumstances, being assisted in making the sale by his mother and an intimate friend; and subsequently bringing suit on the bond then given, the purchaser was advised that the deed from a Deaf Mute was not valid, and appealed to the Court of Chancery for his own protection. Chancellor Kent decided that the deed was valid under the circumstances; yet that "the bill does not appear to have been filed vexatiously, but rather to obtain, for greater caution, the opinion of the court on a point which had been left quite doubtful in many of the books, and which had never received any discussion here." The Chancellor observes: "Upon the finding of the jury under the commission, in nature of a writ *de lunatico inquirendo*, I refused to appoint a *committee*, and adjudged that the defendant was not to be

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* 2 Blackstone's Commentaries, 497.

deemed an idiot from the mere circumstance of being born deaf and dumb. This is a clear, settled rule, and numerous instances have occurred in which such afflicted persons have demonstrably shown that they were intelligent, and capable of intellectual and moral cultivation." This is quite a safe assertion, even in this country, in 1820, the date of this case. After citing conflicting cases and authorities, for which we refer our readers to the volume of reports, the learned and able Chancellor goes on to say: "Perhaps, after all, the presumption in the first instance is, that every such person is incompetent. It is a reasonable presumption, in order to ensure protection and prevent fraud, and is founded on the notorious fact, that the want of hearing and speech exceedingly cramps the powers and limits the range of the mind. The failure of the organs necessary for general intercourse and communion with mankind, oppresses the understanding: *affigat humo divinæ particulam auræ.* A special examination, to repel the inference of mental imbecility, seems always to have been required, and this presumption was all that was intended by the civil law, according to the construction of the ecclesiastical courts; for a person born deaf and dumb was allowed to make a will, if it appeared, upon sufficient proof, that he had the requisite understanding and desire. I am satisfied that the plaintiff is justly to be exempted from the charge of a groundless and vexatious inquiry, and the course is not to punish the prosecutor of a charge of lunacy with costs, if the prosecution has been conducted in good faith, and upon probable grounds. I shall, therefore, dismiss the bill without costs."

The effect of this decision seems to be, that a Deaf Mute from birth is, in all cases, to be presumed incompetent to make a will or a contract, till his competency is proved; and that if he sells property, and the buyer afterwards choses to question his competency, he must defend himself at his own costs. We submit that it would be more in accordance with reason and justice to presume his competency, as in the case of men who hear and speak, when he has among his neighbors a reputation for intelligence, and ability to manage his own affairs, and more especially, when he has been taught to read and write. It is to be presumed that no man would make a contract with him, unless he had such a reputation for intelligence and competency; and if the purchaser of property from a Deaf Mute neglected to

ascertain this point beforehand, we, with all due respect to the high authority we have cited, respectfully submit that the *laches* is his own, and that he ought to bear the costs of an inquiry which he ought to have previously made himself. It is observable that Chancellor Kent, in the opinion before us, makes no distinction between Deaf Mutes who have and those who have not been educated. Probably, at that early day, he was hardly aware of the nature of this distinction. Indeed, it is a fact, that there are some uneducated Deaf Mutes more intelligent in matters concerning their own affairs, than are *some* of those who have spent years in an Institution; for all the care of the teacher cannot remedy the original want of capacity. Such cases are however rare. The fact of having been educated is one strong presumption of capacity of a Deaf Mute to manage his own affairs; and if not educated, still his reputation for intelligence among his neighbors ought, as we have already observed, to be presumptive proof as to his capacity or incapacity.

The capacity of making a contract involves the capacity of making a will; as we see, in the citation just given from Chancellor Kent, he refers to the testamentary capacity conceded to Deaf Mutes by "the ecclesiastical courts," where they were proved to have "the requisite understanding and desire," in illustration of the capacity of a Deaf Mute to execute a valid deed. From this decision, therefore, and from the opinion expressed by Surrogate Bradford, before referred to, we are warranted in declaring the law to be, that an intelligent Deaf Mute, even if unable to write, and only able to make his wishes known by signs, can make a valid will, or valid deed, or bind himself to any other obligation or contract. And we have high legal authority for adding, that whatever may be the degree of his intelligence, he is bound for, and an action can be maintained against him for necessaries suitable to his condition, unless it appear that the person who supplied them knew of his want of ordinary intelligence, and imposed upon him. (*Baxter* v. *Earl of Portsmouth*, 7 D. & D. Ky. 614; 5 Barn. & Cres. 170; 2 Car. Pay. 178.)

In the same volume (4th) of Johnson's Chancery Reports, (p. 168,) we find a case in which a woman "unmarried, of the age of sixty years, deaf and dumb from infancy, and of such imbecility of mind as to be incapable of defending the suit" in

which she was legally a party with her brother and others, was admitted to appear and defend by guardian. No special inquiry was here made; the facts on which the application for the appointment of a guardian were founded being merely verified by affidavit. Here, it will be seen the appointment of a guardian was grounded on "imbecility of mind," and not merely on the defendant's being deaf and dumb. She was doubtless uneducated; for, at that date, (1819,) there were no Deaf Mutes in the State of New York, sixty years of age, who had had the opportunity of receiving an education. Had she been educated, however, there can be no question that extreme "imbecility of mind," though it would be less likely to supervene, would, if present, be a cause for appointing a guardian.* We find a French case in point, recorded by Piroux, who informs us that he was called in, as an *expert*, to give advice on the question, whether Frances Boury, one of his former pupils, (at Nancy, in Eastern France,) was in a condition to manage her own estate, or whether it would be for her benefit to name for her a *conseil judiciare*, (a sort of half-guardian.) "Knowing (he says) that this young woman has no longer father or mother; that she is obliged to live with illiterate persons, among whom her instruction cannot be continued, and, finally, that a sickness of nearly a year, which she had when in our establishment, has hindered her progress, we considered that it would be useful for her to name for her a *conseil judiciare*, and the tribunal has, by a judgment, confirmed our opinion." †

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* Since writing this paper, we have examined the laws of Georgia, in which it is enacted, that "Deaf and Dumb persons shall be so far considered idiots in law as to authorize the inferior court to appoint guardians," etc.: provided, it shall be made satisfactorily to appear to said court that such Deaf and Dumb person or persons are incapable of managing his or her estate, or him or her or themselves." This is the only American legislative provision on this point that has come to our notice. Possibly similar provisions may exist in the laws of other States; but we believe not in those of the North-Eastern or Middle States. By the principles and practice of the common law, courts might, without special enactment, appoint guardians for any person satisfactorily shown to be incapable of managing his estate, whether deaf and dumb or not. (See 2 Johnson's New York Chancery Reports, 235.) It seems then the indignation expressed by a Georgia Deaf Mute at the law just cited (Am. Annals, viii, 124,) was rather unnecessary.

† L'Ami des Sourds-Muets, tome v, p. 9: We suppose that a *conseil judiciare* differs from a *curateur* or guardian, in that the latter acts according to his own

Another case is recorded, in which "three Deaf-Mute brothers of Normandy, who could count money, play cards, &c., were *interdicted* (that is, declared incapable of contracting, etc.) by the Civil Tribunal of Loziere. One of them, endowed with a rare intelligence, finding the decision of the Tribunal an obstacle to his marriage, appealed to the *Cour Royale* of Rouen. This court was of opinion that the provisions of the law relative to *interdiction* should be restricted to the three cases of imbecility, dementia, and insanity provided for in the Code; and that this Deaf Mute not being in either of these three cases, could not, on account of his infirmity alone, be subjected to a measure so rigorous as the interdiction."* From these cases we learn, that though through the influence of the Roman and other ancient codes, there is a tendency among lawyers and judges to question the capacity of Deaf Mutes to manage their own affairs, merely on account of their infirmity, yet the better opinion, both under the French laws and our own is, that they are to be treated according to the actual intelligence they evince.

Passing on to another branch of our subject, we will consider the capacity of a Deaf Mute to contract marriage. By the common law, which in this respect differed from the civil (Roman) law, the marriage of an idiot was valid. It seems strangely inconsistent, that the same law which declares this class of persons incapable of giving their consent to anything, still recognized their right to enter into the contract of matrimony. Yet the point, their ability and the validity of such a marriage, appear to have been expressly adjudged. (3 *Coke Lit.* 80 *a*, note 47.) "If he is able to beget either son or daughter," says one of the early writers on the common law, "he is no fool natural." (*Green, Saver de default.*) But in the last century, this long-received doctrine of the common law was called in question; and after much examination and full deliberation on the part of the courts, it was held that this, the most important contract of life,

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judgment, independently of the wishes of his ward, while the former only gives validity to the acts of his ward by his advice and consent. Would not it be useful to have similar provisions in our laws? There are many cases in which persons cannot be trusted with the independent control of their property, and yet ought not to be wholly deprived of the power of managing it.

† Piroux' Journal, L'ami des Sourds-Muets, tome v, p. 52.

the very essence of which is consent, could not be entered into by one destitute of reason. (1 *Hogg. Cons. R.* 417; 2 Phill. 19, 70.)

Of the capacity of a person born deaf and dumb, if *compos mentis*, to contract matrimony, there never appears to have been any doubt under the common law, and the validity of such a marriage contracted by signs, was recognized towards the close of the 17th century. Swinburne, an old writer on the law of marriage, whose work on Spousals was published in 1686, after declaring that some held that words were necessary, as touching the church, and some that they were not, says: "Their consent alone is sufficient for matrimony of whose conjunction there is any ado; and it followeth that he or she which cannot speak may contract matrimony. The reason there yielded is this: *Quod verbis non potest, signis valeat declarare:* that which cannot be expressed by words may be declared by signs; seeing their sole consent is sufficient, and seeing that they which be dumb and cannot speak, may lawfully contract matrimony by signs, which marriage is lawful, and availeth not only before God, but before the church; it followeth that words are not so precisely necessary, as without the which matrimony cannot be contracted; and this conclusion is commonly received of all or the most later writers:" and he refers to a large list of various authors and writers. (*Swinburne on Spousals*, 204, c. xv.)

The rule of the civil law, by which Deaf Mutes were considered incapable of contracting matrimony, appears to have been relaxed by the authority of the church; for we find in the twelfth century, a decretal of Pope Innocent III, authorizing such marriages. Whether this was confined merely to the Papal States, or was designed as a fixed regulation of the ecclesiastical or canon law, we are unable to state. It seems, however, not to have been followed or acted on in countries where the canon law prevailed; for in France the validity of such marriages was not recognized until within a comparatively recent period. According to Professor Vaïsse, they were recognized for the first time by a decree of the Parliament of Paris, of the 16th of January, 1658. We have already stated the fact, that the authors of the civil code, (the famous Code Napoleon,) rejected the project of a law on this point, leaving it to the tribunals to judge according to the circumstances of each case. In France,

where the Deaf Mute can read and write, there is, of course, no difficulty. Where he is illiterate, different views have been taken by the magistrates before whom Deaf Mutes have presented themselves, attended by their most intimate friends as interpreters, in order to have the civil part of the contract of marriage legally performed. (In France, the reader should bear in mind, the law requires a civil contract of marriage to be entered into before the *maire* of the *commune;* and takes no notice of the religious ceremony, for which the parties usually proceed from the office of the *maire* (mayor) to the church.) Some amusing cases are recorded in Piroux' Journal. In August, 1842, the *maire* of Gensac, a little village of Guyenne, was summoned before the civil tribunal of Castel-Sarrasin, at the instance of Marguerite L., an uneducated Deaf Mute, whose marriage he had refused to celebrate. "Marguerite was a young woman of twenty-five, robust, healthy, affectionate, capable of managing household affairs, intelligent enough to wind up the house clock, and set it to the right hour, and, for a peasant, rich. A young man of the same village sought her in marriage. The girl consented, so her parents attest, as well as the play of her features, and her signs as expressive as tender. But *M. le Maire*, cold interpreter of the law, who acknowledged in the young woman the most praiseworthy qualities, avowing that she kept her cows with care, that she is a good housewife, that she fulfills admirably the duties of a daughter, but who did not find in her the intelligence of the chapter VI of the Civil Code, title of Marriage, on the duties of husbands and wives—refused to see a consent to marriage in those signs which the amorous Thyrsis found so expressive.

Appearing before the tribunal, the President sent out her friends, and attempted to interrogate her, with a loud voice, himself—of course without any result. The best educated Deaf Mute, unless he had acquired a rare faculty of reading on the lips, had been equally unable to understand the President's questions. This proceeding gives no very favorable idea of the sagacity of the judge, or of his appreciation of the peculiar circumstances of a Deaf Mute. Her mother being then called in, the President desired her to ask her daughter whom she wished to marry, and to tell her to seek him in the hall. After some pantomime between the mother and daughter, the latter hastily

passed among the assembled crowd, found her lover, and led him forward by the hand, amidst the encouraging smiles of the spectators. Her advocate maintained that she had sufficiently manifested her wish to marry the Sieur B.; but the *procureur de roi* replied:

"The question has been put wrong; we have not to inquire whether the young woman L. attends to her household affairs, whether she cooks well or ill—these facts are not contested; but whether she comprehends the burdens and duties (*charges et devoirs*) of marriage; we have to inquire whether she is capable of giving an intelligent consent. We think not. It is not enough, in order to prove that she comprehends the importance of this solemn act, that she should push from her the *huissier**, or that she should lead forward her *pretendant*, (suitor.) Whatever her advocate may have maintained, marriage does not consist in the mere bringing together of the sexes: marriage is rather a moral and civil bond which forms families; families are the nursery of the State. Among us one does not make a gipsy marriage—a marriage by breaking the pitcher.† You will, therefore, reject the demand of the Deaf Mute, and condemn her to pay the costs." (*Piroux' Journal*, iv, 140.)

The distinguished Deaf Mute Berthier, commenting in the public prints on this specious reasoning, remarks: "These burdens and duties of marriage, is it then necessary that the Deaf and Dumb should know them more thoroughly than other men? Are there, for their peculiar use, definitions more philosophical and metaphysical? The first village lout who presents himself is allowed to marry, provided he says yes, and a doctor's diploma is almost necessary to the Deaf Mute who would marry."

The court, not being satisfied with the proofs offered of the intelligence of Marguerite L., named as interpreter, a curate, who demanded three months to enable him to communicate with the Deaf Mute. Whether, after this delay, the marriage was finally ordered, is not on record. We cannot but agree

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* The *huissier* of the court had been proposed to her (in pantomime) as her future husband.

† A ceremony of marriage observed by the French gipsies.

with Berthier that the suit of Marguerite was subjected to delay, and perhaps to final refusal, rather on the ignorance of the court than of the Deaf-Mute suitor. It had been far more rational to have sent for some person already habituated to converse with the Deaf and Dumb; as was done in the next case we cite.

This case occurred in Provence, a few months later. The *Maire* of Rousillon scrupled to perform the ceremony of marriage for a Deaf-Mute bride, an intelligent dress-maker, but who could only express herself by signs. The case was carried to the civil tribunal of Apt, when (in December, 1842,) after argument on both sides, and an examination of the would-be bride in open court, by sworn interpreters, who were themselves well educated Deaf Mutes, "after a session that lasted two hours, the tribunal declared Victoire Mathiew competent to give an intelligent consent to be married; found no hindrance to this marriage; and ordered that the two interpreters who had already served the court, should assist the mayor at the celebration; that their interrogation should be reduced to the *proces verbal* by the mayor, and annexed to the *acte** of marriage, which should be signed by the same interpreters."† This decision, in connection with that already given in the case of Clergue, seems definitely to establish the doctrine that, in France, an illiterate Deaf Mute, if of sufficient intelligence, and able to clearly manifest his wishes by signs, is capable of entering into the contract of marriage, or any other civil contract.

In some other European countries, greater difficulties are opposed to the marriages of even educated Deaf Mutes. In Prussia, it is said, two Deaf Mutes are not permitted to marry, lest they should have Deaf Mute children,—a chance which experience in our own country has shown to be too small to be a valid pretext for forbidding a union, that in other respects promises to promote the happiness of the parties.

In Switzerland, at least in Berne, the largest of the Swiss Cantons, Deaf Mutes, even if well educated, cannot marry without having first obtained the consent of the courts of law.

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* Eqiuvalent, or nearly so, to what we call a *certificate* of marriage.

† Piroux' Journal, v. 20.

The following case, which we find in Pircux' Journal, the American reader can also consult in the chapter on the Deaf and Dumb in Beck's Medical Jurisprudence.

Anna Luthi was one of the most intelligent and best educated pupils of the Deaf and Dumb Institution of Berne. Her father was dead, and her mother re-married. She was a very pretty young woman of twenty-five, and possessed a fortune of thirty thousand francs. Her hand was demanded in marriage by one M. Brossard, who had been deaf from the age of fourteen, a skillful lithographer, employed several years in the Institution where Mademoiselle Luthi was educated,—a man of thirty-two years, possessing an excellent character, and already having laid up some money.

Some of the relatives of the demoiselle Luthi, and especially the authorities of her commune, jealous, it was said, of a stranger to the Canton becoming proprietor of the fortune which they would rather have fall to one of their own young men,—opposed this marriage; raising the pretexts that Brossard had abused his situation as her teacher to make her sign a promise of marriage; that he sought only her fortune, and that it was to be feared that the children of such a union would inherit the misfortune of their parents. This last allegation was countenanced by the local medical men, and the judges refused consent to the marriage. The lovers appealed to the Supreme Tribunal of Berne; and certificates from the first professors of medicine of that city were procured in opposition to the opinion of the local physicians, as to the danger of the children inheriting the deafness of the parents; letters were produced from the young woman to Brossard, sufficiently evincing both her intelligence and her affection; and the tribunal unanimously decided that: "In the circumstances of the case, a refusal of consent would be equivalent to a general and absolute prohibition of the marriage of Deaf Mutes, which, however, is not in the law; farther, that the very conditions in which the parties found themselves were a sort of guaranty that the demoiselle Luthi would find in him, more than in any other man, one capable of alleviating her situation, and that their pecuniary resources gave them the means to procure all necessary aid in taking care of their children."

The decision of the inferior court was accordingly reversed, and the marriage permitted.

In this country, where there is no law against the marriage of Deaf Mutes, the scruples of one magistrate or minister need not hinder a ceremony, if the parties can find another, more reasonable or more intelligent. Neither are they restricted, as in some European countries, to have the ceremony performed in their own *commune* or district. A marriage for which the parties have crossed a State line, or any other line, if celebrated in accordance with the local law, is as valid as if they had been married at home. They have thus a wide field in which to find officers qualified and willing to perform the ceremony.

The cases raised before the French and Swiss courts can hardly be considered legal questions with us. They are rather cases of conscience, and of common prudence, to be considered by the friends of a Deaf Mute, if they have any influence in aiding to, or dissuading from a marriage. In this country, where education has been placed, by the benevolence and justice of our legislatures, within the reach of almost every Deaf Mute of fair capacity; we should hardly object to a rule that uneducated Deaf Mutes ought not to marry; for we trust there will in time to come be very few Deaf Mutes in our country of such capacity and energy that they ought to be encouraged to marry at all,—left without education. Yet we have known several uneducated Mutes who have fulfilled, as well as ignorant speaking persons generally do, the duties of husbands or wives and parents.*

Several hundred marriages have been contracted by graduates of the American Schools for the Deaf and Dumb within the last thirty years. In the majority of these cases, both the parties were Deaf Mutes. Though able to read and write, they always prefer to have the ceremony performed in their own language of gestures, whenever a clergyman can be found who

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* Chancellor Kent observes, (4 Johnson Ch. Rep. 345,) "It is too plain a proposition to be questioned, that idiots and lunatics are incapable of entering into the matrimonial contract;" but he also decided, as we have already noted, that even an illiterate man "was not to be deemed an idiot from the mere circumstance of being born deaf and dumb."

understands it, or a good interpreter can be obtained. The superior impressiveness and solemnity of a ceremony so performed, to one performed in writing, is a sufficient reason for this preference. In cases of which we recollect some in which one or both of the parties were uneducated Mutes, the necessary questions and answers were of course either made by signs, or translated in that language by some person accustomed to communicate with the Deaf Mute. It ought to be more generally known than it is, that the intelligence of a Deaf Mute does not depend wholly, or perhaps even chiefly, on his skill in written language; that, on the contrary, it depends very much on the copiousness and precision of his colloquial dialect of signs, and on the extent to which he can converse by that means with those around him. A Deaf Mute possessed of such a dialect may be very intelligent though almost or quite illiterate. Hence it is that even a short residence at one of our institutions is so beneficial, even where only a very imperfect knowledge of written language was acquired; partly by the acquisition of an improved dialect of signs, which in an institution is very rapidly made, while the study of written language is slow, and partly from the amount of general information acquired by free conversation with the more advanced pupils. A Deaf Mute of naturally quick perceptions will acquire by mere observation, tolerably correct ideas of the nature and responsibilities of the marriage relation, even if wholly illiterate. And a Deaf Mute, who from interruptions to his term of instruction, has but a very scanty knowledge of written language, may be, and often is as capable of understanding and fulfilling these responsibilities and duties as those who hear and speak.

We pass on to another of the questions before us, "The proper mode in which a person profoundly deaf, and having little or no skill in the language of signs, or having no interpreter who understands signs, but understanding writing perfectly, should take a judicial oath, or assume any legal obligation?"

In the case of a Deaf Mute who cannot read and write, or but imperfectly, the rule of the law, as we shall hereafter show, is to employ a sworn interpreter familiar with his modes of communication. In the case of one who understands writing perfectly, it will appear by an English case we shall hereafter cite,

the proper mode is to *write* to him what you would *speak* to one who can hear; and let him *write* what the latter would speak. In the practical application of this rule there may be differences of opinion. The only thing essential is that the Deaf person should show in an unequivocal manner that he understands what is written to him, and that he assents to it where his assent is required. We have already cited an opinion of the learned Surrogate of New York, that a Deaf Mute could go through the whole ceremony of executing a will "by means of a conversation in writing." In like manner an oath can doubtless be administered in writing; but whether it is enough to write it before the eyes of the Deaf Mute, requiring him to read and sign it, (laying his hand on the Bible at the same time, or performing such other ceremony as the case may require,) or whether he should be required to copy it, is, in the absence of any statutory provisions, a question to be determined by the tribunal before which the Deaf Mute appears as a witness.

We would, however, observe, that though the copying of the form of oath secures greater attention to the words that compose it, it is not, in the case of a Deaf Mute, any test whatever that he understands it, any more than a foreigner's repeating after the magistrate a form of words in English would be a test that he understood it. It is therefore, in every such case, the duty of the judge to satisfy himself, by a conversation in writing, that the Deaf Mute who offers to take an oath has a just idea of the nature of the ceremony, and is aware of the consequences of perjury; and that he understands the purport of the particular oath placed before him. Piroux records a case in which a Deaf Mute presented himself as an elector, (voter.) He wrote out very readily and neatly, the prescribed oath of an elector; but on attempting to communicate with him by writing, no answers could be obtained to the simplest questions. When asked for instance, What is your name? he merely copied the words. An educated Mute, called in as interpreter, could not even communicate with him by signs, (perhaps because the signs he used were too artificial.) "In these circumstances the tribunal (of Narboune) considered that the Deaf Mute could neither read nor write; and declared him incapable of fulfilling the functions of a communal elector, since it was impossible to make him comprehend what an elector is called on to do, nor what was that oath

of which he copied so well the formula, but to which he could attach no meaning.*

Where the Deaf Mute, understanding writing either imperfectly or not at all, is reduced to the aid of an interpreter for taking an oath, or for any other legal proceeding, a teacher of the Deaf and Dumb will undoubtedly be, in most cases, the most proper person, as being accustomed to express in clear and impressive signs, moral and religious ideas.† The intimate acquaintances of an illiterate Deaf Mute, however readily they may converse with him on matters of every-day life, will, in most cases, be much embarrassed in endeavoring to express, in pantomime, such ideas as pertain to the taking of an oath. We shall hereafter cite cases in point.

When Deaf Mutes appear before the tribunals, whether as complainants, accused, or witnesses, much embarrassment often results from their inability to comply with the old established forms, adapted for those who hear and speak. The common law, indeed, permits the form of an oath, where it is not prescribed by statute, to be varied so as to adapt it to the religious belief of the witness, or to have it taken in that form which he deems most binding; and of course in the mode which will speak the most directly and powerfully to his conscience. With this principle in view, we shall have no difficulty in deciding that an oath ought to be administered to a Deaf Mute, (we do not mean a semi-Mute, or one who understands writing better than signs)—to a Deaf Mute we say, by means of an interpretation in his own language of gestures. Papists are sworn on the crucifix, Mahometans on the Koran, Hindoos on the waters of the Ganges, &c. The same principle should teach us that, if it be deemed essential to secure a religious sanction, or the dread of punishment beyond human power, for an oath taken by a Deaf Mute, it will suffice if, though not indoctrinated in the mysteries

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* L'Ami des Sourds-Muets, ii, 76, 77.

† Though the advantage of having an interpreter, one skilled in the system of signs used in an institution, is of course greatest where the Deaf Mute is already acquainted with that system of signs; yet the power which the teacher acquires of exhibiting to his new pupils religious and moral ideas clearly in pantomime, enables him to impart such ideas to an uneducated Mute more readily than any other person could.

of the Christian religion, he still believes, as most Deaf Mutes, even if uneducated, do, that there are superior beings in the sky, by whom wicked men are punished. But, as we shall hereafter explain, the laws of some of the States have done away with the religious test as affecting the competency of the witness; leaving it as one of the grounds on which the jury shall judge of his credibility. And in the case of a Deaf-Mute prisoner, brought before the tribunals for formal trial—though naturally more weight is given to difficulties of form, when they make in behalf of the prisoner, especially of a prisoner whose double misfortune gives him such claim to compassion—we apprehend such difficulties can be got over by the simple rule of regarding it as the duty of the court or of the prisoner's counsel to do in his behalf, whatever he wants intelligence to do for himself. The questions that are on such occasions sometimes raised, as to the degree of capacity and accountability of uneducated Mutes, are more difficult of solution.

The *Code Napoleon* prescribes the forms to be observed in the case of an accused person, or a witness who is a Deaf Mute. "When a Deaf-Mute *accusé* does not know how to write, the president shall appoint as his interpreter the person who is most habituated to converse with him." "The same provision is made in the case of a Deaf-Mute witness. "In case the Deaf Mute knows how to write, the *greffier* (clerk) shall write the questions and observations made to him; they shall be put before the accused or witness, who will render by writing their answers or declarations, The whole shall be read aloud by the *greffier*." (Criminal Code, Art. 333.)

We doubt whether this particularity in prescribing forms is judicious. There are cases in which some persons skilled in the idioms and mental characteristics of the Deaf and Dumb as a class will make a better interpreter than the person most accustomed to converse with the prisoner, who, moreover, may possibly be deficient in honesty or intelligence, or both. In fact, it appears that the French tribunals usually call upon a teacher of the Deaf and Dumb, or a well educated Mute, to serve as interpreter in such cases; probably making the letter of the code defer to its spirit. And where an intelligent and reliable interpreter is present, and the Deaf Mute, as most Deaf Mutes do,

understands signs better than writing, it seems to us preferable that, even when able to read and write passably well, his examination should be conducted by signs. Not only will the questions put to him be, in most cases more fully understood; but his examination will more nearly approach, in solemnity and directness of appeal to his conscience, the oral examination of an ordinary witness. Often, however, a reliable interpreter may not be procurable; in some cases, even, the Deaf witness may not understand signs as well as writing; and the counsel on the one side or the other may wish to put questions of their own wording: in short, we give the preference to the rules of our common law, under which the courts, on good advisement, have full latitude of decision what mode of examination is best under the circumstances of the case. We shall hereafter cite decisions in point. (See *Snyder* v. *Nations*, 5 Blackford's Rep. (Indiana) 295. *Morrison* v. *Leonard*, 3 Car. & Pay. 127. *St. of Conn.* v. *De Wolf*, 8 Conn. Rep. 93.)

It is a point worthy of special mention, that some uneducated Deaf Mutes communicate with their intimate companions by means of a peculiar dialect, which even those who are conversant with the Deaf and Dumb would, at first, not understand. In a case which occurred in the interior of New York, an action of affiliation was brought in behalf of an uneducated Deaf and Dumb girl. She appeared before the court to give her evidence, accompanied by her sister as interpreter, who communicated with her, not by natural signs, or motions of the hands and fingers, but by motions of the lips which to the bystanders presented only uncouth and unintelligible mouthings and grimaces. The opposing counsel, believing that this was all a deception, wrote to Dr. Peet of the New York Institution for the Deaf and Dumb, for his opinion in the case. Dr. Peet called up two of his pupils, a brother and sister, who he knew were accustomed to converse by similar means, having been taught to understand the motions of the lips, aided by grimaces and gestures, by their father. He found them able to converse in this way to a considerable extent, and answered the lawyer's enquiry accordingly. It is a fact that when hearing has been lost at such an age that an imperfect power of speech remains, the Deaf person makes little or no use of those gestures on which Deaf Mutes from birth rely; but

communicates with those most intimate with him by his imperfect speech, especially if he cannot read and write, divining their replies by the motions of the lips, to which grimaces and some simple gestures will often be added for greater clearness and significance. And, as we have seen, cases sometimes occur in which the use of the voice may be lost entirely, only the motions of the lips and the accompanying grimaces remaining. A Deaf Mute from birth, or early infancy, naturally converses by means of gestures, unless a different mode of communication is early taught him; a Deaf person who learned to read before his misfortune, may acquire a decided preference for writing, or the manual alphabet, as a means of communication; but a child who becomes deaf after he is able to speak pretty fluently, but before learning to read, is naturally led to efforts to divine what is said to him from the motions of the lips and changes of the countenance, the most difficult and least certain mode of the three—though some Deaf persons of quick perceptions have acquired surprising readiness and expertness in *guessing* words from the motions of the lips. And as the case just cited shows, Deaf Mutes from birth sometimes learn to converse in a peculiar dialect of labial movements and grimaces.

[Since this paper was written, we have obtained fuller particulars of this case; and, as it seems one of some interest and importance, we annex the correspondence between the defendant's counsel and Dr. Peet, and also statements made by Hon. Bishop Perkins, counsel on the other side, and Joseph Barnes, Esq., one of the judges before whom the case was brought on appeal. The order of affiliation was made by two Justices of St. Lawrence county, (town of Gouverneur,) in March, 1850, and on appeal to the County Sessions, on the 4th and 5th of April following, after a very long and minute investigation, which seems to have turned wholly on the ability of Mrs. Thayer, the sister of the Deaf Mute, to communicate with her by motions of the lips, the order was confirmed—showing that men who seduce Deaf Mutes, must not expect to escape the consequences by the inability of the latter to testify against them.

The Defendant's Counsel to Dr. Peet.

CANTON, ST. LAWRENCE COUNTY,
March 21, 1850.

Dear Sir,—I was called a few days ago to attend in my professional capacity an examination before a magistrate in the town of Gouverneur in this county, in a case of bastardy; the object of the examination being to determine judicially who was the father of a child likely to be born a bastard of a young woman about 27 years of age, then pregnant, and who has been from her birth *deaf* and *dumb*.

The young woman, above described, was the principal witness of course, and gave evidence through another person, sworn to interpret truly the questions of the court to her, and her answers to the court.

The interpreter employed on this occasion was an elder sister of the Mute, who testified that the Deaf and Dumb girl had resided in the family for several years, and professed to be able to communicate freely with her by repeating to her the questions proposed, calling the Mute's attention to the movement of her own lips, and the expression of her countenance, in the act of speaking or whispering to the Mute, and by the movements of the Mute's lips, and certain inarticulate sounds uttered by the Mute in reply, the interpreter professed to ask and to receive answers from the Mute, respecting the subject of the investigation. For instance—the interpreter is desired to ask the Mute, "When and where the connection took place, from which she became pregnant?"

The interpreter looks attentively in the Mute's face, and moves her lips, as if repeating those words, (but uttering no audible sound, *nor making any manual signs*.)

The Mute then moves her lips (with considerable distortion of countenance,) and the interpreter states, "she says it was on a Sunday afternoon in the month of June. I was with a little girl picking berries by the road side, near a piece of woods; the defendant came there, and hired the little girl to go further away, on pretence of getting some berries, and while she was absent had the connection with me," &c.

The girl is uneducated, that is to say, she has been at no

school where persons of that description are taught, nor has she been taught any alphabet of signs,* but appears to be tolerably intelligent for one of her condition, can write her own name, and can select and arrange in their proper order printed letters, so as to spell correctly her own name.

Now, sir, it seems to me incredible that a person deaf and dumb from birth, and consequently [having] no conception of articulate sounds, could be so astonishingly quick and acute, as to receive and impart freely ideas in the manner I have attempted to describe.

I believed, and still believe, that the person employed in this instance to interpret, was practicing a sheer imposition. If the Dumb can thus speak, it seems to me little short of miraculous, and that we need no schools specially devoted to their instruction.

May I be permitted, although an entire stranger and claiming no right to intrude my correspondence upon you, to ask you in your professional capacity, as a person having great experience of this unfortunate class of persons, whether in your opinion it is possible that a person mute and deaf, such as I have described, can converse and be conversed with in the way I have described?

Did you ever, in your intercourse with your pupils or others of that class of persons, discover or practice such a medium of communicating ideas?

I hope, sir, that the interest you may feel in the subject of my inquiry, or mere courtesy to a stranger, may induce an early answer to this hasty inquiry, and that you will pardon the liberty I take in asking this favor. Will you also please enclose *this letter* to me with your reply, if possible without delay.

I am, sir, very respectfully yours,

THOMAS V. RUSSELL.

To the Superintendent of the New York Deaf and Dumb Asylum, New York.

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* We suppose Mr. Russell means a *Manual* alphabet.

Dr. Peet's Reply.

Dear Sir,—In answer to the inquiry contained in your letter of the 21st inst., as to the possibility of holding communication with a person deaf from birth, simply by the motions of the lips, as if speaking, with or without articulate sounds, I reply, that the process which you describe as having been pursued in the case referred to, is precisely the method adopted in the German schools, where the teaching of articulation and of labial reading is practiced. For a Deaf Mute taught in this mode, it evidently makes very little difference whether the person speaking to him articulates his words audibly, or merely goes through the motions of the lips and other organs of speech.

Abstractly considered, therefore, I consider that method of communicating ideas possible. But two things are to be specially observed. In the first place, long and constant practice, both on the part of the Deaf person, and of the individual communicating with him, is necessary before this faculty is acquired, even in a limited degree; and secondly, the sounds uttered by the Deaf person and the motions of the lips, would probably, I may say in a majority of cases certainly, be unintelligible and unmeaning to all except the person or persons accustomed to them, and in the constant habit of thus communicating with him.

In the specific case which you present, I am, of course, unable to give an opinion, not being acquainted with facts and circumstances indispensable to the formation of a correct judgment. But if these sisters have been long in the habit of conversing in the manner you describe, I should consider it highly probable, their previous good character for veracity being presumed, that the questions and answers were truly and faithfully interpreted, not perhaps in the precise terms in which they are given, but in language which use had rendered intelligible to both.

In such a case, the signs made by the expressions of the countenance and the movements of the lips, are analogous to those made by the hands and arms. The use of neither of these sorts of signs indicates or requires a knowledge of the inflections of the parts of speech, or the laws which govern

the collocation and arrangement of words in connected discourse. The significancy and intelligibility of this sort of labial signs, like those of manual signs, would be the growth of slow progress, patient effort, and daily, even hourly use, for no inconsiderable length of time. In the case of persons who have become deaf in childhood, after learning to speak more or less, the motions of the lips serve to suggest words still remembered. *They* read words in those motions, as we do on paper, much less distinctly indeed: more like reading short hand, where some words being clearly made out, others are guessed at by the connection. But with one deaf from birth, the ideas must be attached directly to the motions of the lips, and accompanying grimaces, or distortions of the countenance. A person attempting to establish communication with a Deaf Mute in this mode, would naturally begin with single words, names of objects in sight, and of simple actions and obvious qualities. The meaning of each word or labial sign is thus first established by convention, and with time and unwearied pains, a Deaf Mute may be enabled to communicate on any ordinary matters of daily use, by means of a peculiar dialect thus formed; the terms of which are to the speaking person words probably in an inverted and broken order,—and to the Deaf Mute labial signs, each representing directly an idea. In the case of the sisters now in question, it is probable they did not use the same phraseology that marks the conversation of other persons; that is to say, the words of which they imitated the labial motions were not in the order in which those who hear and speak arrange them, nor always the same words. The preference would be given for words more distinctly marked on the lips; and, to save the labor of learning synonymes, one familiar word would be made to represent several expressing similar ideas. Thus the terms they used would probably suggest the outlines only of ideas, made more definite by the accompanying expression of the countenance, and, when interpreted, to make them intelligible to others, would be reduced to a grammatical arrangement, as in the examples cited by you. The language, therefore, embodying the answers of the Deaf Mute girl to the question proposed to her, was not that uttered by her, in so many words, but the language of her older sister interpreting the idea intended to be expressed.

Instances have occurred in my own practice, and I may say not a few, of parents who have conversed with their Deaf children in this manner, and without the intervention of signs of any kind. Such cases, of course, are much more common where the children learned to speak before becoming deaf; but, as I have just explained, it is possible to establish with a bright and intelligent Deaf Mute from birth a quite copious dialect of labial motions and grimaces. There are now in this Institution two pupils, a brother and sister, whose father always communicated with them, and received their replies by a system of "labial reading." On the receipt of your letter, I called these pupils into my room for the purpose of making an experiment. I directed the brother to put to his sister certain questions which I presented to him in writing, and which she, of course, did not see. The result was satisfactory, though I remarked, that in some instances, the language of the question was changed by the substitution of familiar words for those less familiar. In reply to my question how they had acquired this faculty, they replied, that they had grown into it by long habit.

One word respecting the inference which you draw as to the necessity of schools specially for the Deaf and Dumb. A moment's reflection, I think, will show you the fallacy of your conclusion. Though this faculty of reading on the lips, and the power of expressing ideas by the motions of the vocal organs, or, I may say more correctly, by sounds inarticulate and unintelligible except to those accustomed to them, may, by long continued and laborious effort, be acquired by some Deaf persons—it is not possible for all. And even in the case of those few, it is obviously by no means available for general intercourse, whether for social enjoyment, or in matters of business, the power of communicating in this mode being (except in rare cases of the success of accomplished teachers of articulation) confined to the few with whom the Deaf Mute has been in constant communication for a long series of years, generally beginning in early infancy, as for instance, among the members of the same family. This was forcibly illustrated in the necessity for an interpreter between the court and the witness, in the case which you present.

And I may add that the dialect of labial motions and grimaces established in the family with a Deaf child will be too

meagre and imperfect to enable the Deaf Mute to attain such a mental and moral development as is easily and readily attained under the system pursued in a special school; such a development, in short, as might have made the young woman you mention a useful, respected and happy member of society.

You will perceive from the above, that I consider it possible for a person deaf from birth to receive and impart ideas in the manner you describe. Whether there was collusion between the sisters, is a question to be determined by facts, and not on abstract principles. It is, however, worthy of remark, that the supposition of collusion would imply the possibility of intercommunication of some kind between the parties.

Very respectfully yours,

HARVEY P. PEET.

THOMAS V. RUSSELL, ESQ.

ST. LAWRENCE COUNTY SESSIONS.

The Overseers of the Poor of the Town of Gouverneur
vs.
George P. Tuttle.

JOSEPH BARNES, ESQ.

Dear Sir,—The above action was an appeal from the decision of two justices of the peace of the town of Gouverneur affiliating upon the defendant Tuttle, a bastard child born of Mary Coats, a Deaf Mute. It appeared that the said Mary Coats was deaf and dumb from her nativity and had received no scientific instruction; that her relatives were in low circumstances as to property, and no method of communication as to things not in sight was ever established between her and her sister, or any of her family, save by the motion of the lips and mouth. I was retained as counsel for the Overseers of the Poor. Olive Thayer was sister of the Mute, and the only medium of communication between her and the court.

When I was first retained, I was exceedingly incredulous touching the ability to communicate between Mary and her sister, in the manner alleged, particularly the abstract idea contained in an oath, or the capacity of the Mute, by motion of the lips,

to convey to her sister the fact of sexual connection, impregnation, and the name of the father; and the time and place of the sexual intercourse; and accepted a retainer with the greatest reluctance, and only after assurances of the neighbors of their entire belief in the integrity of Mrs. Thayer. I then, before the trial came on, visited Mrs. Thayer and the Mute, several times questioning the Mute through her sister, and sending the Mute for several articles, such as water and candles, into different rooms, and under circumstances where it seemed to me impossible any other medium than the lips of her sister could have been used to communicate my mandates, which were in every instance obeyed, and finally, in response of questions propounded by me, and communicated to her, by movements of her sister's lips, for the purpose of ascertaining whether she could understand the nature of an oath. I thought it quite plain she understood her, that she was to be brought before a court, and required to tell the truth as to who was the father of her child. She, by signs and acts intelligible to me, without her sister's aid, gave me to understand, if she told false, she would be taken from her child and imprisoned. I could not make out that she had any idea of an unseen Omniscient power, or of future rewards; but having satisfied myself that the Mute and her sister could communicate with each other, through motions of the lips by her sister, and signs and motions by the Mute, I entered upon the trial of the appeal with the zeal becoming a man who believed a Deaf Mute had been seduced by a man under the belief that sexual intercourse was marriage.

For some six or eight hours before the Mute was sworn, various questions were propounded, and directions given to Mrs. Thayer to direct the Mute by her lips to do certain things. In nearly every instance the Mute did the act required of her, and I was, and I believe the court and bystanders were all entirely satisfied that Mrs. Thayer made no motion, look or gesture, save with her lips, indicating to the Mute what was desired of her.

The counsel of the defendant placed, or caused to be placed, in a room near the foot of the stairs leading from the court room to the front door, or principal entrance, on the left hand side of the lower hall, an umbrella, and bid the sister to describe the location of the umbrella and send the Mute after it. The Mute left the court room, went down winding stairs, and sought the

umbrella in a room opposite to the one where the umbrella was placed. The Mute returned, saying, as Mrs. Thayer said, there was no umbrella there. Her sister was informed by the constable, that the Mute went to the room opposite the one she was directed to go to. Mrs. Thayer, as she said, explained to the Mute by motions of her lips that the umbrella was in the room opposite the one she went to. In an instant the eyes of the Mute flashed with intelligence, and she flew from the court room and brought the umbrella. Many other like experiments were tried, and most if not every one that related to common and familiar objects, were correctly responded to by the Mute, by doing the act demanded of her. I believe all were convinced. Mrs. Thayer made no sign save with her lips.

The order of filiation was confirmed by the court.

This statement, though an imperfect one, will, I think, give a tolerable idea of the very interesting trial on the affiliation of the child of Mary Coats, and, I hope, afford Mr. Peet the information he solicits in his letter to you.

I have written in haste and have no time to revise the literary execution of this account.

Respectfully, yours,

BISHOP PERKINS.

CANTON, October 24, 1856.

DR. H. P. PEET:

My Dear Sir,—I this day received the enclosed statement from Hon. Bishop Perkins after so long delay. His statement is not as full as the facts would warrant, giving the several experiments in the court room, and being present myself, one of the Court of the County Sessions, well recollect the case: the court room full, not a person doubted her ability to communicate with the Mute in the way described by Mr. Perkins.

In addition to the statement of Mr. Perkins, I would say that the defendant's counsel, as well as Mr. Perkins, counsel for Overseers of the Poor, directed Mrs. Thayer to communicate with *Mary* by her lips—without the use of her hands—looking her full in the face and directing her to snuff the candle on the desk, which she did at once—then to extinguish a certain other candle

then burning in another part of the court room—select the Bible from two or three piles of books on the lawyers' table—then to point out to the defendant the father of her child in a crowded court room—send her for water and other things.

It is proper here to say, that many experiments to test the witness, at the request of the defendant's counsel, one after another, until she was sent for the umbrella down the stairs—passing the length of the court room—descending winding stairs to the centre hall of court house—jury rooms on either side of hall—turning right and left in the hall—opening door—taking the umbrella into the court room above to her sister. This seemed to be satisfactory to all parties.

I am, dear sir, truly yours,

JOSEPH BARNES.]

In Beck's Medical Jurisprudence, (vol. i, p. 855,) we find a case cited somewhat similar to that just mentioned as occurring in the State of New York. James Whyte was charged, in April, 1842, at the Circuit Court of Justiciary, held at Stirling in Scotland, with robbery. "The principal witness, James Shaw, was called, and one of the crown witnesses, named McFarlane, having been sworn to act as interpreter, McF. deposed that he had known Shaw from his earliest years, had been on intimate footing with him, and was, on that account, able to communicate with him better than any other person whom he knew; that Shaw was not born deaf, but became so by disease about the age of seven years; that he had been stone-deaf ever since, and had lost, in a great measure, the faculty of speech; that he could talk a little, but so very inarticulately that none but those who were in the habit of communicating with him could understand his meaning; that the mode of communicating with him was partly by signs, and partly by the motions of the lips. The interpreter having been desired by the court to repeat the oath to the witness, after communicating with him, stated that though he believed Shaw to be naturally honest and trustworthy, he found it impossible to convey to his mind any idea of an oath: that the subject of their communications had always been about ordinary country matters, and that as Shaw had received no education whatever, it was his decided opinion

that he could not comprehend the obligation of speaking the truth." In these circumstances, the court held that the witness could not be sworn, and he was accordingly rejected.

This decision is very unsatisfactory. A rule of law which may preclude a man who has been robbed from giving evidence against the robber, thus defeating the ends of justice, ought not, in our view, to be based on the mere ignorance of the injured party. His ignorance, (in this case certainly not from any fault of his own,) makes him the more helpless, and hence more deserving of the protection of the law. We think the inquiry ought to have been, not whether Shaw understood the nature and obligation of an oath,—but whether he was likely to tell the truth, and could relate clearly doings in which he was concerned. And if that fact was established to the satisfaction of the judges, his testimony should have been admissible for what it was worth.

It is a well settled rule of the common law, of general application in this country and in England, that no witness is competent, unless he has a conception of divine punishment being a consequence of falsehood. (1 Phillips' Evidence, 6.) Still even under the common law there seem to have been cases in which this rule was made to bend to the common sense view, that children of tender years, and others like them, are as innocent as they are ignorant, and when not perverted, or under the influence of interested persons, naturally and spontaneously tell the truth. No one will affirm that the ceremony of administering an oath always secures truthful answers from the witness; and we venture to say, there is no judge or lawyer, who would not sooner believe the artless relation of his child of five or six years, whom he has never known to tell an untruth, than the oath of an over-age witness whose interests or feelings are involved in the cause.*

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* In an old American edition of the famous English compilation, *Burns' Justice*, (Conductor Generalis, etc., by James Parker, New York, 1788,) we find the following (p. 170, *Evidence*): "In many cases an infant of tender years may be examined without oath, where the exigence of the case requires it; which possibly, being fortified with concurrent evidence, may be of some weight, especially in cases of rape, buggery, and such crimes as are practiced upon children. 2 H. H. (Hale's Hist.) 279, 284; Str. 700." Now a Deaf Mute, as ignorant and uncultivated as Shaw, is almost precisely in the mental and moral condition of a little child.

We see, therefore, no reason why, if such a Deaf-Mute witness should be found incapable of understanding the nature of an oath, that ceremony might not be dispensed with, and his testimony taken, leaving to the jury to judge, from the consistency of his narrative, from confirmatory circumstances, or evidence of others, and from the reputation of the witness among his acquaintances, what degree of credit should be attached to his statements. If it should be established that a Deaf Mute who, for lack of education, cannot understand the nature of an oath, is incompetent to give testimony against those who have wronged him, evidently this most unfortunate class of persons will be at the mercy of the evil disposed.

The extent to which advocates will push a point of form, like that under consideration, in order to gain an advantage in a bad cause, is strikingly exemplified in another Scotch case cited by Beck, (vol. i, pp. 863–4):

"An interesting discussion took place last winter in the High Court of Justiciary, as to whether or not a Deaf Mute was capable of giving evidence. A rape had been committed on a Deaf and Dumb girl, and her evidence was objected to by the counsel for the prisoner, who argued that though it was admitted to the fullest extent, that she had a perfect idea of the existence of a Supreme Being and a future state, and though she might be perfectly convinced of the obligation under which she lay to speak the truth, yet every one had as perfect a knowledge at least of these facts and obligations as she could possibly have, yet their testimony went for nothing unless confirmed by an oath: and as it was obvious she could not give an oath, her testimony must go for nothing." (Dunlap.)

Such pleading as this is a disgrace to the Scotch bar. To argue that a Deaf Mute, in the rudest state of ignorance, was not a competent witness, because he could not understand the nature and obligation of an oath, seems plausible; but to argue that one who has been educated, and is fully aware of the religious nature and solemn significance of an oath, and of the temporal and eternal consequences of perjury, is not a competent witness, merely because she cannot comply with a mere form, adapted to the use of those who hear and speak, is to outrage every sentiment of justice, every dictate of common sense. We cannot believe the court lent any countenance to such a plea.

Beck does not, in this place, give the decision; but the case seems to us to have been the same thus mentioned by him (on page 855): "The chief witness in a case of rape was deaf and dumb, but had been instructed, and her intelligence proved by an examination of her teachers."

In England, it has been decided that a person born deaf and dumb, even if utterly unable to read and write, is competent as a witness, provided he evinces sufficient understanding. This was determined in a case at the Old Bailey, in January sessions, 1786, on the trial of one William Bartlett for simple grand larceny. "John Ruston, a man deaf and dumb from his birth, was produced as a witness on the part of the crown. Martha Ruston, his sister, being examined on the *voir dire*, it appeared that she and her brother had been, for a series of years, enabled to understand each other by means of certain arbitrary signs and motions, which time and necessity had invented between them. She acknowledged that these signs and motions were not significant of letters, syllables, words or sentences, but expressive of general propositions and entire conceptions of the mind, and the subjects of their conversation had been in general confined to domestic concerns and familiar occurrences of life. She believed, however, that her brother had a perfect knowledge of the tenets of Christianity, and was certain that she could communicate to him true notions of the moral and religious nature of an oath, and of the temporal dangers of perjury.

"It was objected by the prisoner's counsel, that although these modes of conveying intelligence might be capable of impressing the mind with some simple ideas of the existence of a God, and of a future state of rewards and punishments, yet they were utterly incapable of communicating any perfect notions of the vast and complicated system of the Christian religion, and thence the witness could not with propriety be sworn on the Holy Gospels. The difficulty of arraigning a man for perjury, whom the law presumes to be an idiot, and who is, consequently, incapable of being instructed in the nature of the proceedings against him, was also urged against the admissibility of the witness.

"But the court overruled the objections, and John Ruston was sworn to depose 'the truth,' and Martha Ruston 'well and truly to interpret to John Ruston, a witness here produced in

behalf of the King against William Bartlett, the questions and demands made by the court to the said John Ruston, and his answers to them.' The prisoner was found guilty, and received sentence of transportation for seven years. (Phillips' Law of Evidence, p. 14; Luch's Cases in Crown Law, p. 455.)"

The only essential difference between this case and the Scotch case, in which the evidence of John Shaw was rejected, is that, in the case of John Ruston, his sister professed to be able to communicate to him by signs "true notions of the moral and religious nature of an oath," whereas the interpreter of Shaw did not believe he could communicate any such ideas to him. Martha Ruston might have overrated the capacity of her brother, and McFarlane might have underrated the capacity of his friend. When we recollect that Shaw could hear and speak to the age of seven, it seems improbable that he should not have retained some notions on religious matters, and on the obligation of speaking the truth, though he might have lost the ability to express them clearly. We are persuaded that a person expert in the language of the Deaf and Dumb, and accustomed to express in that language the rudiments of moral and religious truth, would have found in Shaw, as well as in Ruston, sufficient intelligence and moral sense to admit of his evidence being received.

We have found but one American case, (*Snyder* v. *Nation*, 5 Blackford's Reports, 295, State of Indiana,) in which a Deaf Mute's comprehension of the religious obligation of an oath came in question. The action was one for assault and battery, and the plaintiff produced a Deaf Mute as a witness. The competency of the witness being objected to, the court caused him to be examined by means of signs, touching the extent of his knowledge of the nature of an oath. It appeared that he understood that perjury was punishable by law, but he had no conception of the religious obligation of an oath. The presiding judge, however admitted him to testify, and the interpreter having sworn that he could communicate with him by signs, he was examined as a witness through the interpreter. From this decision an appeal was taken, and Dewers, justice, in affirming the ruling of the judge at the trial, said: "That a witness is deaf and dumb, forms no objection to his admissibility: such a person, who can be communicated with by signs, is a competent witness at the common law, if he has sufficient discretion, and a proper sense

of the sanctity of an oath. But as the statute of Indiana provided that want of religious belief should not affect the competency of the witness, but should only go to his credibility, that that removed the objection to the witness that would otherwise have existed on account of his ignorance of the moral responsibility of the oath, apart from temporal punishment." So that it seems, from this decision, that ignorance on the part of a Deaf Mute of the religious obligation of an oath, would exclude him as a witness, except in States, like Indiana and New York, where the religious test is abolished. The extent to which this religious test is sometimes carried, may be judged from an English case decided in 1836. A woman was indicted for the murder of her husband, and their child, a girl of the age of eight years, was brought upon the stand as a witness. It appeared, that before the death of the deceased, the child had never heard of God, had never prayed, knew nothing of a future state of rewards and punishments, or of the nature of an oath; but, after that event, had been visited by clergymen, who instructed her as to the nature of an oath. When examined by the judge, she answered that she should go to hell if she told a lie; that hell was under the kitchen grate; but had no other intelligence as to religion or a future state. She was not allowed to testify. (*The King* v. *Rachel Williams*, 7 Car. & Pay. 320.)*

We have before referred to the case of Morrison and Seward (3 *Carrington and Payne*, p. 127,) which is of interest as giving the views of an English judge, as to the manner in which the evidence of a Deaf Mute should be taken, when he is able to read and write. "In that case an apprentice was called as a witness. He had been born deaf and dumb, and an interpreter was sworn, who put questions to him by signs made with his fingers,† and was answered in the same mode.

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* After the case just cited, the reader may not unprofitably consult an imaginary case reported by Charles Dickens; we refer to the rejection of the testimony of the boy Jo, on the coroner's inquest. (Bleak House, chapter xi.) We hope the time may come when, in other States as well as Indiana and New York, technical objections to "competency" may be done away with, and all the evidence, that a candid man would consider in making up his private opinion, admitted for what it may be worth.

† Evidently by a Manual Alphabet.

The interpreter said that he spelt every word to the witness completely. It appeared that the witness was able to write.

Chief Justice Best observed, I have been doubting whether, as this lad can write, we ought not to make him write his answers. We are bound to adopt the best mode. I should certainly receive the present mode of interpreting even in a capital case; but I think, when the witness can write, that is a more certain mode."

On this we observe that, where the witness can read and write *perfectly well*, the process prescribed by the French Code—questions and answers in writing—is undoubtedly the best mode; but there are very various degrees of skill in written language among educated Mutes; and the greater number of them understand written language more or less imperfectly. There are many Deaf Mutes whose knowledge of written language suffices for simple questions and answers on familiar subjects, who would yet be unable to comprehend, or would misapprehend the wording of many of the questions that would be put before them in a court of justice; and, on the other hand, will fail clearly to express their own meaning in words. The safest way is to provide them with an interpreter capable of explaining what they do not understand when written; and of interpreting their meaning, when their own skill in written language fails to render it truly.*

Whether a Deaf Mute appears as a witness or as the accused person, some care and skill are requisite in conducting that preliminary examination in writing which is necessary to determine how far he is conversant with written language. If he answers some questions with evident intelligence, and distinctly intimates that he does not understand others, his examination may be cautiously proceeded with; though it would be better, if the questions he does not understand are of any importance, to wait for an interpreter. But if he either returns no answer to simple questions, or answers by merely copying the questions, or is found by various trials, (as by varying the phraseology of the questions,)† to answer at random, or as if he only caught

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* Since writing the above, we find our views confirmed by the case of the State of Connecticut *vs.* DeWolf, which will presently be cited in full.

† E. g. ask, "Is your father living?" and after a while ask, "Is your father dead?" If he has not understood the questions, he will be apt to give contra-

the meaning of one or two words in the question, then an examination in writing would lead to nothing but mistakes and loss of time, if not to serious injustice to the prisoner through misapprehension, and an interpreter skilled in communicating with the Deaf and Dumb, or familiar with the particular dialect of the individual, is quite indispensable.

Hoffbauer, a German writer on medical jurisprudence, cites the case of one Brunning, an uneducated Deaf Mute, who had killed a cutler with whom he was traveling, and possessed himself of the cutler's shoes and effects.* Brunning could write a little—that is, he could write his own name, and could copy words placed before him. When asked in writing, "*What is your name?*" he wrote "*J. Brunning;*" but when asked, "Is this the place where you killed the cutler?" he merely copied the words. When asked, "Where is your money?" after studying the words attentively, he indicated, by expressive gestures, that it had been taken from his pockets by force, as indeed was done when he was arrested. He, probably, merely understood the word *money*, and that awakened his indignation at the manner in which he had been treated. Other questions were put before him, which, from his gestures, his examiners supposed he understood; but those who, with a better knowledge of the characteristics of Deaf Mutes, read the account of the proceedings, will conclude that he merely guessed widely at the meaning from one or two words, or answered altogether at random. For instance, when the question, *Who killed the cutler?* was written before his eyes, he again wrote his own name, *J. Brunning*, and at the same time pointed to himself, not as we believe, intending to accuse himself of the murder, though his examiners so received it, but supposing that the question was an invitation to write his name. He had asserted (by signs) that the cutler had taken from him, while he slept, a box and money; and was asked, "Whether the sack shown to him was the same he had taken from the man who had stolen from his pocket?" the examiners, and even Hoffbauer in commenting on the case, supposed he

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dictory answers. This is for such questions as only require a *yes* or *no*. With some other questions, as: "How old are you?" "What is your trade?" "How long has your father been dead?" etc., the answers will at once show whether the question was understood.

* This case occurred in December, 1764, in the Duchy of Magdeburg.

understood the question, because, on being invited to take what belonged to him, he carefully examined the box, and separated his own effects from the rest; but Dr. Itard of Paris, in a note on this passage, observes with reason, that no imperfectly educated Deaf Mute could clearly understand a question thus complicated, and loaded with pronouns. Brunning merely followed his instinct in claiming the box, and separating his own effects from the rest, without having any idea of the precise scope of the question placed before him. We have cited this case as an illustration of the danger of mutual misunderstandings in an examination by writing of a Deaf Mute who can only read and write very imperfectly.

It may sometimes happen that a Deaf Mute criminal may, from a hope of escaping punishment, feign to know much less of writing than he does. He may be aware that ignorance, especially in his circumstances, excites compassion, and is held in some measure to excuse faults. In such cases, Dr. Itard advises to accuse him of a crime much more serious than, and altogether different from that actually charged against him. If he can really read and write, his surprise and indignation will break out at the false charge in a manner to show what degree of skill in written language he actually possesses.*

We will close this branch of the subject by giving at length an important case already referred to, the *State of Connecticut* v. *De Wolf*, (8 Conn. Rep. 93,) as it relates not only to the manner of examining this class of witnesses, but includes other matters, touching their character, and the nature and effect of their testimony. The prisoner De Wolf (a young physician) was indicted for an attempt to commit a rape upon the person of a deaf and dumb girl, named Celestia Bull,† on the 15th of June, 1828. She was sworn as a witness, and testified to the principal facts by signs, which were interpreted by Wm. W. Turner, a teacher in (and now the principal of) the American Asylum for the education of the Deaf and Dumb. The interpreter testified

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* Note to Hoffbauer's *Médicine Légale*, Paris edition, 1827, page 223. (Translation of M. Chambeyron.)

† It may be proper to observe that Celestia was deaf from the age of two years, but that those who are deaf from so early an age, do not differ appreciably from those deaf from birth.

that Celestia had resided in the Asylum for five years; that she was well acquainted with the language of signs, and capable of relating facts correctly in that manner; that she could read and write, and communicate her ideas imperfectly by writing. It was objected on the part of the prisoner that she should not be allowed to testify by signs, but ought to give her testimony in her own words in writing, but the judge overruled the objection, and she was allowed to testify by signs. After the prisoner's counsel had cross-examined her in relation to the principal fact charged, and she had returned answers that went to discredit her testimony.* the public prosecutor, before any attempt was made to discredit her otherwise than by such cross-examination, offered Polly Rowley as a witness to prove that Celestia had communicated to her the same story which she had related upon the trial. The prisoner's counsel objected, but their objection was overruled. Polly Rowley was then put upon the stand, and testified that in the fall of 1829, Celestia had communicated to her in writing the substance of what she now testified to upon the trial, but that she, the witness, did not know where the writing was. The prisoner's counsel objected to this testimony, unless the writing was produced and read to the court; but the objection was overruled. The public prosecutor then offered to prove that the general character of Celestia for truth was good: the prisoner's counsel objected, but the testimony was received. I think, said the presiding judge, that in prosecutions for rape, the general character of the witness who is the victim of the outrage may always be shown; but, said he, without deciding this point, let us look for a moment at the condition of this woman. She may fitly be said to be a stranger in her own neighborhood. Unable to hear or speak, she is excluded from society, and can be known only to a few of her relations and companions in affliction. Had the outrage been sworn to by a stranger passing transiently through the State, it would certainly have been proper for the State's attorney to prove the character of the witness. I think therefore, upon similar principles, that it was proper to support the character of this witness. The prisoner's counsel then at-

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* The questions on the cross-examination were put in signs through another teacher of the Asylum, Rev. Mr. Brinsmate, who had been induced to attend the trial in behalf of De Wolf.

tempted to discredit the prosecutor's testimony, by showing that she had given different accounts of the transaction on oath and in writing;* and Celestia having sworn that she had concealed the transaction for more than a year, assigning as a reason for it, the threats and influence of the prisoner, and her fear of him, the public prosecutor offered to show that the Deaf and Dumb have a sense of inferiority to other people, and that, as a class, they are easily intimidated; that they are credulous, sincere and submissive, and that this was the character of Celestia. The prisoner's counsel objected to the evidence, but the court admitted it. The prisoner having been convicted, an application was made to the Supreme Court for a new trial, on the grounds: 1st, that the court below erred in allowing the witness Celestia to testify by signs: 2d, in allowing evidence of her written communication to Polly Rowley, without the production of the paper, or proof that it could not be found after diligent search: 3d, in receiving the testimony just referred to as to the sense of inferiority felt by the Deaf and Dumb as a class, and their credulous and submissive character, &c.

In respect to the admissibility of this evidence, the court were divided. Justice Peters thought that the court below were right in receiving it; but Justice Dagget, and the three other judges thought otherwise; Dagget, who delivered the opinion of the majority, saying that they thought this decision on the trial erroneous, as opening a door for enquiries interminable, and where, after all, no satisfactory result can be obtained. But in respect to the examination of Celestia by signs, he said, the other judges concurring, it appeared she could communicate her ideas *imperfectly* by writing, but was capable of relating facts *correctly* by signs. The objection then, thus viewed, presents the absurdity, that the court erred in resorting to the most perfect mode of ascertaining the truth. The mode of examination adopted by the court was the next best to an oral examination, which, for many obvious reasons, is preferable to an examination in writing, but which could not be had in this case, from the condition of the witness. A new trial was ordered for the error of the court below, in receiving the testimony as to the contrast between the

* If this was so, it may have merely proceeded from her imperfect skill in written language.

Deaf and Dumb and other people in the matters referred to; and in allowing evidence of the contents of the written paper without producing it, or showing that it could not be found after a diligent search.*

This case is an authority for assuming and declaring it to be the law, as it certainly is the dictate of reason, that in the examination of a Deaf and Dumb witness, that mode is to be adopted which will enable the witness most accurately to convey his ideas. To which we would add, for the reasons already given, that as a general rule (exceptions have been noted on previous pages,) an examination by signs through a competent interpreter is preferable to any other mode.

In regard to the other questions raised on this trial, there is room for difference of opinion. It appears to us that the rule of law which precludes parol evidence of the contents of a written paper, except upon proof that the paper is lost, should not be as stringently enforced in the case of conversations held by a Deaf Mute in writing as in other cases. A Deaf Mute who expressed her ideas, as was the case with Celestia, but imperfectly in writing, would, at the time of writing, explain and enforce her meaning by accompanying looks and gestures. Hence the actual impression made by the communication at the time, might be quite different from that which the mere writing would convey, especially to one not conversant with the peculiar idioms of the Deaf and Dumb. The writing would be but a part of the actual communication. In such a case, supposing that Polly and Celestia—as from the circumstance of the former being a selected confidant is a natural inference—were intimate, and understood each other perfectly, it is evident that the parol evidence of Polly would give a more correct idea of the purport of Celestia's communication than would be derived from a mere inspection of the writing itself, supposing it could be found; and it was probably a loose scrap of paper, thrown aside when the conversation ended. If, therefore, (which however does not clearly appear from the report, but is very probable from the circumstances, Celestia's imperfect acquaintance with written language, and the delicate nature of her communication, not to be easily

* It is our impression that the prosecution was dropped. Miss B. has since married a Deaf Mute.

put wholly in words by one little skilled in written language,) if therefore, the communication from Celestia to Polly was by writing in part, explained by looks and gestures, the very principle which required the examination of Celestia by signs, would consider the evidence of Polly as to the purport of the communication as of more weight than the writing itself; it would be in the language of Justice Dagget, "the most perfect mode of ascertaining the truth" that the peculiar case would admit.

With regard to the alleged credulous, submissive, and timid character of the Deaf and Dumb, two distinct questions arise: the admissibility of such evidence, and the correctness of the opinion expressed by Mr. Turner. We will consider the last first, as it seems proper to enquire whether we have any thing to prove, before we enter into a dispute about the introduction of our evidence.

We need hardly say that there are no peculiar traits of character inherent in the Deaf and Dumb, as such, merely as developments of some peculiarity of organization. What peculiarities they do display are the results of the peculiarities of their circumstances. They are comparatively ignorant, from the greater difficulty of obtaining knowledge; and if they are credulous, it is because credulity is usually in proportion to ignorance. He who usually hears but one side of a story, believes what he hears; he who hears all sides, learns to doubt, and to weigh probabilities. The Deaf and Dumb must feel, in society, a sense of inferiority, which makes them dependent and submissive towards those in whom they have confidence as guides. It is the same feeling that would make a blind man in a crowd, or in a strange locality, cling to the arm of a friend who enjoys eyesight. But where they think themselves acquainted with the ground, they are apt to display sufficient strength of will; indeed, willfulness is one of the most salient faults of a neglected or petted Deaf Mute, as of other neglected or petted children. Timidity is, we think, not a trait of their character. A man who recoils from a haunted house, may show as much courage as others who do not share that feeling, when there is a real, visible danger to be met; and if Deaf Mutes are liable to be intimidated, it is to be ascribed to their ignorance, exaggerating the power of him who attempts to intimidate them, and not forseeing as readily as others would the means of defence.

It is obvious that, for Deaf Mute girls, the chances for forming a desirable marriage are much fewer than for their sisters and companions of equal or even inferior personal attractions, while the hope and desire of such an event is at least equally strong. Hence, they are apt to interpret as serious, to encourage by receiving them with evident gratification, attentions which had no worthier motives than curiosity and compassion, and which are continued merely because the flirtation is agreeable. De Wolf, we have understood, won the confidence of Celestia by his readiness in learning to converse with her by the manual alphabet and signs. A Deaf Mute, isolated in society, is peculiarly susceptible to attentions which at once flatter her vanity, increase her social enjoyments, and relieve the painful sense of inferiority to her speaking companions. He probably acquired an influence over her; and having, in some moment of temptation, gone farther than he wished to have known, it is very natural and probable that he should exert whatever influence her hopes, her fears, and her ignorance gave him, to induce her to keep the transaction secret.

If the ignorance of the Deaf and Dumb, their imperfect appreciation of consequences, and the difficulty for them of finding sympathy and judicious advice in delicate circumstances, have, as we believe, a tendency to induce want of moral strength in the way of appreciating and resenting such injuries as that in question, this should surely not make them the less worthy of or less needful of the protection of the law. It certainly appears to us that the rule of the law, that makes so long a silence after such an outrage, a presumption against the credibility of the witness, might be somewhat relaxed in circumstances like these. If it appeared that the injured woman was ignorant or doubtful of the consequences of disclosure, feared injury to herself in character and feelings, or had no intimate friend to whom she could feel free to confide such a secret, or who was capable of urging those reasons that lead us to prosecute offences for the good of society, or for the abstract interests of justice; under such influences it does not appear to us that her silence should make against her credibility, if her statements are otherwise consistent and probable. If the Deaf and Dumb are entitled to sympathy and consideration on account of their misfortune, the ignorance and want of moral strength, which are

the natural result of that misfortune, ought also to be considered.

We might extend our remarks on this point, had we such a report of the case as would show distinctly the *reasons* on which the admission of this evidence was pronounced an error. Since the ruling of the court below was supported by one out of five of the justices of the Supreme Court, there would appear to be some doubt on this matter, and it seems to us worthy of a fuller examination. We imagine the objections of De Wolf's counsel were taken under the impression that their client's cause was sufficiently prejudiced by the natural sympathy of a jury for a woman in her unhappy circumstances, and that the introduction of the evidence in question would augment that prejudice to a degree that might lessen his chance of a fair trial.*

We will now proceed to the examination of the question, how far Deaf Mutes are responsible for their acts criminally, and will direct our inquiries first to the common law upon the subject, that being the law of this country and of England, where it has not been altered by statutory regulations.

By the mode of trial adopted under the common law, a man, when arraigned for a criminal offence, must answer whether he is guilty or not guilty; for if he admits himself to be guilty, no trial is necessary, and judgment passes against him at once. Now, it is impossible for a mute to comply with this regulation, and hence, at a very early period in the history of the English law, it was found necessary to ascertain whether a person so arraigned, stood mute from perverseness, or through the visitation of God? This standing mute through perverseness was regarded as an offence to be punished with the greatest severity; because, as the law then stood, a person indicted for any offence under treason could not be convicted, unless he had plead, that is, admitted or denied his guilt; and, without a conviction, there could be no escheat or forfeiture of his lands. One accused of crime, therefore, who knew that the evidence of his guilt was ample, and that conviction must inevitably follow upon his trial,†

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* In this case, the second trial ordered by the court resulted in an acquital.

† And we add one innocent of the crime charged, who knew that from the power of his accusers, or the prejudice against him, he had no chance for a fair trial, as was the case with old Giles Cory, in the evil days of the Salem Witch-

had a temptation to stand mute, as thereby his land would be preserved to his heirs, and not escheat to his lord or the crown. It was, therefore, the object of the law to extort from such persons a plea that would subject them at once to judgment, or put them upon their trial, and, with that view, punishment more rigorous and cruel than the immediate infliction of death was resorted to, to compel an answer. The prisoner was remanded back to prison, and left to starve to death, unless he answered. This horrible punishment was in some degree mitigated by a statute of Edward I, (3 Edw. I, c. 12,) at least so as to lessen the duration of the prisoner's sufferings."* By the practice under that statute, he was "put in a low dark room, laid upon his back, without any covering except for his privy parts, and as many weights were laid upon him as he could bear. On the first day, three morsels of the worst bread were given him; on the second day, three draughts of standing water;" and so on, alternately, he was supplied with this quantity of bread one day, and of water the other, and kept in this condition till he died, or, as the judgment ran, until he answered. This most barbarous statute, though long fallen into disuse, was not repealed till the reign of George III, when it was enacted that persons willfully refusing to plead, should be taken and deemed to have plead guilty. This barbarous punishment of the "peine forté et dure" was one of those relics of feudal abuses swept away, in most of the American States, soon after the Revolution.†

There is, we have the satisfaction of believing, no reason to suppose that those deprived by nature of the power of speech were, through ignorance or judicial mistake, subjected to this terrible punishment, for it appears that as early as the reign of Henry III, it was provided that if the prisoner stood mute, the court should immediately summon a jury to try if he stood mute through obstinacy, or by the visitation of God; and this

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craft, by a "barbarous usage," says the historian Bancroft, "never again followed in the colonies, he was pressed to death for refusing to plead."

* If a sentence to be racked to death can be considered a mitigation of one to be simply starved to death.

† It was enacted in New Jersey, in 1795, "That the law relative to the peine forté et dure shall be and hereby is abolished." (Paterson, 163.) Probably, if any case had occurred in which it had been enforced, it would have been abolished sooner.

was afterwards made obligatory upon the court by statute, (8 Henry IV, 2.) If the jury found that he remained mute from natural infirmity, a plea of not guilty was recorded, and it became the duty of the court to act as his counsel, and see that he had law and justice—a practice which has continued down to our own time. See the case of the *Commonwealth of Massachusetts* v. *Bradley*, (1 Mass. Rep. 103,) where a prisoner indicted for the murder of his wife stood mute, and a jury was empanneled who found that he did so by the visitation of God. And see *The King* v. *Pritchard*, 7 Car. & Pay. 303; *The King* v. *Dyson*, ibid, 305, u. a. In the State of New York, this inquest by a jury is superseded by the provisions of the Revised Statutes, (2 R. S. 730, § 70,) that if a prisoner does not confess himself guilty, a plea of not guilty is recorded, and he is put on his trial.

What was done in the early days of the English law, where it was found that a prisoner stood mute by visitation of God, does not distinctly appear. Brooke, whose work was published in 1576, states the case of a man arraigned for felony in the reign of Edward III, who could neither speak nor hear, who was, therefore, remanded to prison. (Brooke's La Grande Abridgment, Title Crown, 107, 217.) The case mentioned by this writer is probably the one referred to in the Year Books, where, from the very brief report that is given, (Book of Assize, xxvi, 27; 26 of Edw. III,) it appears that Skip, Justice, informed his brethren that he had a case at the circuit of a man indicted for murder, who could neither speak nor hear; and it would seem that the court did not know what to do in such a case, and finally concluded to remand the man back to prison, upon the statement of Hill, Justice, that he had a case in which a man who was mad, *furiosés enragé*, slew four men, and that he would not arraign him, but sent him back to prison, where he remained until the king pardoned him. Upon the authority of this case, Crompton, in his work on the authority and jurisdiction of courts (1594,) expresses a doubt whether a man unable to speak or hear could be put upon his trial for a criminal offence, by reason of his inability to plead to the arraingment; and how the law stood in such cases, down to the reign of Charles II, we are unable to state. By the common law, no man can be held accountable, criminally, for his acts, who, from

natural infirmity, is incapable of distinguishing between good and evil., (2 Hawkins' Pleas of the Crown 2, note 2; 1 Hale, 34;) but the Deaf and Dumb, though they may be in this condition, are not necessarily so, as a consequence of their infirmity, and any positive rule of law founded on that presumption, would be erroneous. Whether a Deaf Mute is in this condition or not, is not a question of law, but a question of fact, to be ascertained in each particular case. In the celebrated work of Sir Matthew Hale upon the Pleas of the Crown, which did not appear till after his death in 1676, we find the law on this point stated more intelligibly and rationally than seems to have been the case before his time. "A man," says this great lawyer, "who is *surdus et mutus a nativitate*, is, in presumption of law, an idiot, the rather because he hath no possibility to understand what is forbidden to be done, or under what penalties. But if it appear that he hath the use of understanding, which many of that condition discover by signs to a very great measure, he may be tried, and suffer judgment and execution, though great caution is to be used therein." (Hale's P. C. 34.) And the view thus taken of the law by this eminent judge was sustained in cases subsequently adjudged. The question came up directly for decision in a case which occurred at the old Bailey in 1773, before Mr. Justice Blackstone, the celebrated author of the Commentaries. A man named Jones was indicted for felony. Upon being put to the bar, he appeared to be deaf and dumb. A jury was accordingly empanneled, who found he was mute through the visitation of God, but it appearing that he was in the habit of communicating his ideas to a woman of the name of Fanny Lazarus, she was sworn and examined as to the fact of her being able to make the prisoner understand what she said, and it appearing that he was capable of receiving intelligence from her by means of signs, he was arraigned, put upon his trial, convicted and transported. (*The King* v. *Jones*, 1 Leach's Crown Cases, 102.)*

To the same effect was the decision in the case of Elizabeth

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* Would there have been any remedy on the part of the prosecution if the prisoner's intimate friends had refused to fulfill this unfriendly office of interpreter, thus aiding to procure the transportation, or possibly hanging of their friend and relative?

Steele, (Leach's Crown Cases, 451.) She was indicted for grand larceny, and standing mute, a jury was empanneled, who found that she was mute by the visitation of God. She was then remanded to prison, and the question was submitted to all the judges whether or not she could be put upon her trial for the offence. The judges accordingly assembled to consider the case, and were of opinion that the verdict of mute by visitation of God was no bar to her being tried upon the indictment; for they declared that although a person *surdus et mutus a nativitate*, is, in contemplation of law, incapable of guilt upon a presumption of idiotism, yet that presumption may be repelled by evidence of that capacity to understand by signs and tokens, which it is known that persons thus afflicted frequently possess to a very great extent; that great diligence and circumspection, however, ought to be exercised in so critical a case; and that if all means to convey intelligence to the mind of such a person, respecting the nature of the arraignment, should prove ineffectual, that the clerk might enter the plea of not guilty, and it would then become the duty of the court to inquire of all those points of which the prisoner might take advantage, to examine all the proceedings with a critical eye, and to render to the prisoner every possible service consistent with the rules of law.

Upon this decision being given, the prisoner was again arraigned before Mr. Justice Heath, and when the clerk put the question to her whether she was guilty or not guilty, she answered "You know I cannot hear." The judge, upon the supposition that she could hear, said, "Your case has been considered by all the judges, and they think, even though you cannot hear, that you should be tried on the indictment; it will therefore be in vain for you to elude arraignment by pretended deafness, for you will lose by such pretence the advantage of putting questions to the witness." But all endeavors proving ineffectual, a jury was (again) sworn to say if she stood mute by visitation of God, and having pronounced that she did, the same jury were then sworn in chief to try her, and the evidence being very clear, she was found guilty, and sentenced to transportation for seven years. It would seem from the statement that the woman, when asked "Are you guilty or not guilty?" answered, "You know I cannot hear," that she had lost her hearing at so late an age as to retain the faculty of speech; yet from the difficulty of

communicating with her, we may presume she could neither read writing nor read on the lips. While the case of Jones shows that under the common law, a Deaf Mute from birth, yet not an idiot, may be arraigned and tried, if one can be found capable of communicating with him by signs, this case of Elizabeth Steele indicates as we understand it, that even if there be no means of communicating to the deaf and illiterate prisoner, yet, if he appear capable of distinguishing between right and wrong, he may be tried, the court taking care that justice is done him; and if found guilty is liable to the same punishment as one possessed of all his senses. We are constrained to suppose that this woman must have been a notorious and inveterate offender, else the penalty inflicted, seven years' transportation for simple theft, seems unreasonably severe for one in her circumstances, to whom imprisonment or transportation, separating her from all with whom she could hold intercourse, must have been far more severe a punishment than for those not so afflicted. While, therefore, we cite these cases to show that it is the law in England and in the United States that Deaf Mutes are, when they evince an intelligence and ability to distinguish between right and wrong, responsible to the law criminally, and may be put upon trial, notwithstanding the difficulties presented by the forms of proceeding, we would urge that their unfortunate and peculiar circumstances should be taken into consideration to secure mitigation or even remission of punishment, so far as the one or the other may be judged consistent with the ultimate good of the unfortunate prisoner on the one hand, and of society on the other.

We recollect two or three cases occurring in New York and New England, in which Deaf Mutes were arraigned for criminal offences; but have not the particulars. We will, however, cite from Beck's Medical Jurisprudence, the case of Timothy Hill, indicted for larceny in Massachusetts. As in the English case of Jones, resort was had to an interpreter who understood his signs. One Nelson, an acquaintance of the prisoner, was sworn to interpret the indictment to him, as it was read by the clerk, which he did, "by making signs with his fingers;" after which the court ordered the trial to proceed, as on a plea of not guilty. The report of this case is too brief and defective to enable us to judge what degree of intelligence Hill possessed, or whether

the "signs on the fingers" were gestures, words spelled by a manual alphabet, or a mixture of both.

The provisions of the common law respecting those who stand mute, have been incorporated in the statutes of some of the States—as for instance, in Ohio and New Jersey—without any provision for the case of the Deaf and Dumb. The statutes in question direct that where the prisoner is found to stand mute by visitation of God, he shall be remanded to prison, and not proceeded against till he shall have recovered. We presume, however, this provision would not be held to be applicable to the Deaf and Dumb, in whose case there can be no expectation of *recovering* the faculty of speech; and therefore the rule of the English common law, already stated, will remain in force, notwithstanding the omission to provide for the case of the Deaf and Dumb in the statutes in question.

A more unsettled question under the common law, is whether judgment of death can be pronounced against a Deaf and Dumb person when convicted of a capital offence. It seems to have been doubted, as they have not pleaded to the indictment, and can say nothing in arrest of judgment. (4 Blackstone, 324; 2 Hale's P. C. 317.) Both Hale and Blackstone appear to have been in doubt upon the subject, and where such authorities have hesitated, an opinion is not to be expressed lightly. But it seems to us that if a man is held to be sufficiently accountable to be put upon his trial, and to be convicted of a capital offence, that it follows, from the same reason of accountability, that he should suffer the punishment. If he is not responsible for what he has done for want of capacity to distinguish between good and evil, right and wrong, he is not to be convicted; but if he is convicted, it is a finding on the part of the jury that he is accountable in a criminal sense, and if he is, there seems to be no reason why he should not suffer the punishment consequent upon his willful acts. It is declared by the conviction that he committed an act, the nature of which he comprehended as well as those who are possessed of the faculties of speech and of hearing, and if he is not to be punished for it, why convict him at all? If he cannot be punished, because he is unable to hear, plead or speak in arrest of judgment, (things which under an amended system of proceedings, he may do by his counsel,) why put him upon his trial? Why not stop the proceedings at once, as was

the case in the early state of the English law, when it is ascertained that he cannot hear what takes place, or speak for himself. Either the mere fact that he is deaf and dumb exempts him from all accountability to the law, whatever may be the degree of his intelligence or of his capacity, or it does not; and if it does not, but if he is accountable by reason of his capacity to discriminate right from wrong, then, like any other human being, he must suffer the consequences of his willful act. The doubt entertained upon this subject springs out of the tenderness of the law towards the accused, where death follows conviction, and the strictness with which it insists on the due observance of every formality in such cases. The law provides that a prisoner, convicted of a capital offence, should be asked, before his doom is pronounced, if he has anything to say why final judgment—judgment of death should not be rendered against him. The reason given for this proceeding (*The King* v. *Speke*, 3 Salkeld's Reports, 358; 3 Mod. 265,) is that he may have a pardon to plead, or because he has the right at any time after the verdict, and before sentence, to move in arrest of judgment, if any ground exist for such motion—such a motion admitting all the proceedings upon the trial, but assuming or insisting that upon the face of the record itself, the judgment which the court is about to pronounce would be erroneous. In addition to which, the practice is adhered to, that the prisoner may have an opportunity to address the court in mitigation of his conduct, to desire their intercession with the pardoning power, or to cast himself on their mercy,—appeals that are sometimes followed by the recommendation on the part of the court to the executive for a pardon or commutation of the prisoner's punishment. But justice is not to fail because a Deaf Mute, convicted as a responsible being, cannot make this appeal, or hear or respond to the enquiry put to him. If he is able to converse by signs or by writing, the question may be put to him, and answered in that mode. But if he is not able to understand the question, even put in signs, it seems to result that punishment must still follow conviction, to the disregard of a form, compliance with which is impossible. It is not to be supposed that any Deaf-Mute person, wholly deprived of the power of communicating with any one by signs or otherwise, shut out by Providence from all communication with his kind, would be convicted by any

jury for a criminal act, as a responsible being. A Deaf Mute is, in presumption of law, an idiot, not punishable criminally for his act, until it is shown that he is endowed with sufficient intelligence to enable him to discriminate between right and wrong, and the burden of showing this is upon those who prosecute him, or seek to bring him to justice. It is impossible to know this, unless there is some means of communicating with him, to ascertain what his ideas are, or the nature and degree of his intelligence; and if means exist for ascertaining that, sufficiently to satisfy a jury that he knew perfectly well what he did, and that he did it *animo felonico*—that is with a willful or felonious intent,—the same means can be employed for ascertaining his views upon the question put to him by the court, why judgment should not be pronounced against him. That is, the amount of evidence which would be sufficient to satisfy a jury that he had the requisite intelligence to make him accountable for his acts, would equally establish that he had sufficient capacity to understand the nature of the enquiry propounded by the court, and to avail himself of anything that he might think could prove serviceable to him. (And it follows that if he evidently has not the capacity to do this, the jury should find that he had not the capacity to commit the crime charged.) It has been shown moreover that, in all such cases, it is made the especial duty of the court to do all for him that he might do for himself; to examine all the proceedings with a critical eye, to look for every point of which he might take advantage, to proceed with the greatest circumspection, and, in short, to render him every possible service, up to the very moment when judgment is rendered against him, that can be done consistently with the rules of law. There is little reason, therefore, to apprehend that any Deaf Mute would be convicted and sentenced upon a capital charge, without having every advantage that any other prisoner would have upon a capital charge, except that important one of hearing, like ordinary persons, all that transpires on his trial,* and of addressing the court by the

* When we recollect how important is this privilege to the prisoner, of hearing the evidence against him, as in many cases he alone can give a clue to clear up circumstances that make against him, we would strongly insist that, where a Deaf Mute is tried, all the leading points, at least of the evidence and pleadings, ought to be communicated to him, either by signs or by writing.

faculty of speech. If a Deaf Mute has committed murder—if he has taken life willfully, intentionally—that is, with what the law denominates malice aforethought—he is not to escape the punishment with which the law visits the perpetrator of such a crime, because he is deprived of the faculties of hearing and speech. Every thing is to be done for him in the course of his trial, and up to the moment that sentence of death is passed upon him, that can possibly be done for a person laboring under such an infirmity; but he is not to escape the punishment due to his crime, because a form cannot be gone through with on the part of the court, which necessarily could only be intended to apply to cases where such a procedure was possible. If it is supposable that a Deaf Mute would be convicted of a capital offence, the punishment of which was death, who could not be brought to comprehend the nature of the enquiry put before sentence, then all that can be said is, that his incapacity to comprehend would be no barrier to the right and duty of the court to pass sentence upon him. In every case, the enquiry should be put and interpreted to the prisoner, and his answer, if any, interpreted to the court. If he cannot, or if he will not be made to understand it—for want of comprehension would very naturally be assumed by a prisoner so situated, if he thought thereby that he could save his life—then the duty of the court is to proceed and pass sentence upon him. If the court are of opinion that the jury were wrong in convicting him, they can defer sentence, unless restricted to pronounce it within a certain time, until the prisoner's case can be laid before the executive for pardon; but if the executive will not interfere, the court must pronounce judgment, and order execution.

It follows from this reasoning, supplied to us by an eminent judge, that as the verdict of the jury, pronouncing the Deaf-Mute prisoner guilty of the crime charged, also pronounces that he had sufficient capacity to commit the crime, therefore this question of capacity is one of the points they are to take into consideration. We would suggest, as a question worthy of the consideration of criminalists and jurists, whether, as the mind naturally revolts from inflicting the extreme punishment of death upon one already laboring under an infliction so worthy of compassion, whether a distinction cannot be made between the capacity to commit greater and less crimes; whether it might not be

adjudged, for instance, that a Deaf Mute without instruction, who knows nothing of the divine, and very little of the human laws against crime, but whose passions make him dangerous to society, may not be adjudged capable of committing murder in the *second*, but not in the *first* degree. We know of no case, under English and American law, in which a Deaf Mute has been capitally convicted. In the few cases of a capital charge against such persons, to be hereafter cited, the proceedings were stayed on points of form. The provision of the French law, which empowers the jury to return a verdict of "Guilty, with extenuating circumstances," of which we shall hereafter give instances, thus, by saving the life of the prisoner, reconciling conscience with compassion, appear to us more rational than the practice under our common law.

To make this view of criminal jurisprudence, as regards the Deaf and Dumb, as complete as possible, we will give an account of the views entertained in Germany, and of the law as there established, respecting the legal responsibility of the Deaf and Dumb, translated from the work of Henke, one of the leading German writers on medical jurisprudence. (*Lehrbuch der Gerichtlichen Medecin, von Adolph Henke.* Stuttgard, 1832: 7th edition, §§ 289, 290, 291.) "As it must always be a question of doubt whether the Deaf and Dumb are responsible beings, where they have committed illegal acts, their mental condition should be ascertained in most cases through the instrumentality of teachers of the Deaf and Dumb, educated in private or public institutions, as this class of persons can more readily and satisfactorily enquire into the facts than legal physicians,* as they are more familiar with the condition of such persons, with whom they come constantly into contact, or the teacher at least should be consulted by the legal physician. (§ 290.) Under the denomination of Deaf and Dumb are comprised not only the Deaf who cannot speak, but those who have learned to speak more or less, and those who have lost their hearing too early to acquire language in the ordinary way. In consequence of the imperfection of their senses, the Deaf and Dumb must *invariably* be *defi-*

* In Germany, physicians, denominated *legal physicians*, are appointed by the government to enquire into and report upon medical questions connected with crimes.

cient in regard to *mental development* and *cultivation*, and are especially prone to violent passions, to sudden eruptions of temper, to irascibility, and are in general cunning, deceitful, unreliable, and are perversely prone to adhere to their purposes. (§ 291.) As respects their accountablility to the law, the Deaf and Dumb are on a par with idiots and imbeciles, unless their natural infirmity and intractability of mind has been more or less removed by a good education while young, and even if their intelligence is cultivated, they always experience difficulty in understanding others, and in making themselves understood.* In respect to their legal liability or accountability for their acts, the following points should always be considered: 1. The degree of their mental infirmity. 2. Whether the law violated could be understood by them. 3. Whether the exciting cause of the act was different in their case from what it would be in the case of an ordinary person. All these questions, however, can be answered only after a careful investigation of the individual case.†

The question, how far uneducated Deaf Mutes are responsible to the criminal law for their acts, has often been argued within the last thirty years before the French courts. One of the earliest cases we have met with is recorded in Bebian's Journal, (1826.) An officer, with two assistants, went to the house of a peasant near Rodez, to serve an execution. While they were making an inventory of the movables, they discovered the peasant at a distance endeavoring to drive off a cow, which was the most valuable article of his property. He was instantly pursued, and soon overtaken, knocked down, trampled on, and the cord by which he led the cow wrested from him. While one of the officers led the cow in triumph, and another dragged along its unfortunate master by the collar, the son of the latter, returning from his work in the field, saw at a distance the affray. This was a Deaf Mute of about twenty years, tall and vigorous. Furious and indignant at the way he saw his father treated, he seized the first club at hand, fell upon the aggressors with a

* This view of an intelligent German writer we commend to those whose imaginations are taken by the German system of teaching Deaf Mutes to speak, as more attractive than our own system.

† We shall hereafter give a case of the trial of a Deaf Mute for murder, in Rhenish Prussia, in which, it will be seen, he was adjudged not responsible, precisely on what grounds however does not appear.

savage yell, and after a very brief struggle, put all three to flight. Complaint was, of course, made against father and son for rebellion and violent resistance of the officers of the law. The Deaf Mute, when brought before the tribunal, could not be made to comprehend that he had committed any offence. He supposed he was brought there in honor to his courage. When his late antagonists appeared in court, he was with difficulty withheld from attacking them, and endeavored to explain that he saw two robbers, who ought to be punished. Notwithstanding the grave nature of the offence, the task of his advocate was not difficult. All minds and hearts were already prepossessed in his favor, and the advocate had no difficulty in persuading the jury that this youth was not amenable to laws of which he had and could have no knowledge; that he had only fulfilled the most sacred of duties, and exercised the first of rights in defending his father and his property.*

In such a case as this, there can hardly be two opinions. But though we can readily admit that an uneducated Mute is not amenable to the artificial laws of society, we should still hold him amenable in cases where he violates rights in others, which he shows himself so prompt to defend in his own case. The Deaf Mute of Rhodez showed a keen appreciation of the rights of property, and in uneducated Mutes generally this sentiment of property is strong. They must, then, know that they do wrong to steal; and that they are conscious of this is farther proved by the fact, that when they do steal, they steal with secrecy and contrivance, like other men. We cannot, therefore, by any means approve of the defence set up in several cases in France, for uneducated Mutes accused of theft, namely, that an uneducated Deaf Mute is not an accountable moral agent. The first case we have met with in which this plea was advanced, is that of Nadau, also recorded in Bebian's Journal, (p. 42.) This uneducated Deaf Mute was, in July, 1826, brought before the Court of Assizes of Paris for theft. He had already been more than once brought before the tribunals for similar offences, and had suffered a year's imprisonment for theft. M. Paulmier, a distinguished teacher of the Deaf and Dumb, served as interpreter. The *avocat-général* remarked, that "the involuntary

* Journal de l'Instruction des Sourds Muets et des Avengles, Paris, 1826, p. 39.

interest that attached to the accused ought not to make us forget the evidence of the culpability of the prisoner. It has been shown by the depositions of the witnesses, and by the examination of the prisoner through M. Paulmier, that he had very distinct notions of good and evil; that he hid himself to steal; that he hid himself to sell what he had stolen; and, finally, that he confessed with confusion the faults he had committed. Besides, if we suppose that Deaf Mutes have not as precise moral ideas as other men, this Nadau had already been warned by several judicial condemnations, that society punishes those who steal the goods of another. He farther asked the jury to observe how dangerous it would be to grant impunity to the accused. It would be to deprive the unfortunate Deaf and Dumb of the resources they find in labor; for no person would dare to employ them in his service, if it should be decided that the law is impotent to punish their faults.

M. Charles Ledru, who appeared on behalf of Nadau, rested his defence on the ground that a Deaf Mute without instruction is not capable of a *delict*. He maintained that the idea of justice and injustice can only reach the intelligence by the aid of speech, or of words, resting especially on the authority of M. de Bonald, to whose philosophy he took pleasure in rendering public homage. Supposing that the accused could be held culpable after the law of nature, he asked if the civil law could be applied to a man who could never have known it. He concluded by saying that society could not complain of offences committed against her by an unfortunate whom she had abandoned to himself in the midst of a world which is to him an inexplicable mystery. Instead of imprisoning the uneducated Deaf and Dumb, would it not be better to instruct them? This reasoning made such an impression on the jury, that Nadau was acquitted, after a short deliberation.

This doctrine, that the idea of justice or injustice, or any other moral or religious idea, can only reach the mind by means of words, is, we need hardly say, utterly false and groundless. If such were the case, we should, of necessity, despair that our Deaf-Mute pupils could ever attain such ideas. What knowledge of words they possess is, in most cases, acquired through explanations in gestures and in all cases gestures form the readiest means of explaining words to them. It is absurd, then, to imag-

ine that words, whose meaning they have learned only through gestures, can convey to them ideas for the expression of which gestures are inadequate.

But though we utterly repudiate the philosophy which makes the possession of a moral and religious sense depend on the possession of a *verbal* language, we fully admit that, with the uneducated Deaf and Dumb, the intellectual and moral faculties labor under great difficulties and disadvantages as to their development. Some of this class of persons are hardly superior to idiots, and from this low point, their intelligence and moral sense vary over an extended scale, up to nearly or quite the average of ignorant persons generally, who are not Deaf and Dumb. Common sense teaches us that where a Deaf Mute commits a wrong, knowing that it is a wrong, or at least knowing that such acts are punished when detected, he should be punished, without regard to metaphysical speculations as to his exact moral state. But his unfortunate condition may with justice be urged in mitigation of the punishment, and this rational view is the one now prevailing in France. Several instances are recorded, in which, as in the case of Nadau, Deaf Mutes have been acquitted by juries in consideration of this supposed want of moral accountability; but, in other later instances, the verdict has been so framed as only to secure a mitigation of the punishment.

M. Edouard Morel, a very eminent French teacher, commenting on one of those cases in which the plea of want of moral accountability had been set up, justly observes: "Unless he be an idiot, every Deaf Mute who, after having committed a theft, is brought before the tribunals, knows that he has done wrong; and the advocate who is called on to defend him, places himself on a false ground, when, to obtain an acquittal, he sustains that, deprived of hearing and speech, his client is incapable of attaining moral ideas, and ought not, in consequence, to be responsible for his actions.

"If such a doctrine should come to be prevalent, and to be the foundation of our criminal jurisprudence, it might involve the most disastrous consequences for society. Men accustomed to crime would seek, perhaps, for accomplices among uneducated Mutes, and would find in them instruments so much the more docile, that they would be assured in advance of their impunity.

"If I had to defend a Deaf Mute before the courts, I would

carefully abstain from advancing a plea that, in order to save a guilty person, would slander the dignity of human nature, by pronouncing a sentence of incapacity against all the Deaf and Dumb who remain faithful to their duties. I would not fear to avow the fault of my client; but I would throw off the responsibility on society itself, which, by a cruel heedlessness, has left to vegetate in its bosom a whole class of its members, exposed without defence to every temptation of passion, to every solicitation of vice. Without doubt a Deaf Mute is culpable when he commits a bad action; but would it be just to treat him according to the rigor of the law? Can the axiom, *The law is held to be known to all*, be applied to a being who is absolutely incapable of knowing the law?"*

We may add, that the Deaf and Dumb themselves, who must know what their own views and feelings were before instruction, warmly and indignantly reject and repudiate the plea of moral incapacity set up for their uneducated brethren. And we believe it has been generally abandoned. The more rational plea that makes the misfortune of the Deaf Mute criminal an extenuation of his fault, has, however, often been urged with deserved success. For instance, a Deaf Mute who was accused of grand larceny, with the aggravating circumstances of night, and breaking a lock, was, on account of his infirmity, found guilty of larceny simply, without mention of the aggravating circumstances, thus securing a much milder punishment.†

The favor of courts and juries may also be justly invoked for a Deaf person in cases where he has acted under erroneous impressions natural to one in his circumstances. Deaf Mutes and Deaf persons who are not quite dumb, are often suspicious and irritable, from their inability to hear and take part in what is going on around them. They sometimes take as intentional annoyance and insult gestures or practical jests, unskillfully made, which were merely intended as friendly pleasantry. Piroux records the case of Jean-Baptist Villemin, a Deaf Mute

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* Piroux' Journal, i, 21, taken from *La Gazette des Tribunaux, of* 13th *Dec.* 1838.

† Piroux' Journal, ii, 151, case of Collett, who robbed another Deaf Mute. The defence was that Collet, who had received some education, might have the conscience of a bad action, but not of the aggravating circumstances.

of twenty-nine years, very imperfectly educated and of feeble capacity. Placed by the wealth of his family above the necessity of manual labor, and incapable of intellectual labor, he fell into dissolute habits, wandering idle about the fields, and frequenting public houses. One night, in a tavern, he met a man named Marchand, who attempted to amuse himself and the company by making signs to the Deaf Mute which the latter did not understand. Villemin indicated by a gesture that he desired to be let alone; but Marchand continued to annoy him, seizing his head and making a bite at his nose; and brandishing round his head a cane, which he then held in the attitude of firing a gun, saying to the company that he wished to invite Villemin to go a hunting. Villemin naturally lost his patience; unable to understand what was meant by the brutal behavior of Marchand, or to express his own sentiments, except by actions, he seized the aggressor, flung him on the floor, and gave him a kick on the head. Marchand was only slightly hurt. The company declared, and he admitted that he was himself to blame; and he said he harbored no ill will to Villemin, for what had passed. Returning home, a distance of several leagues on foot, he fell sick, and died of a disease of the chest, which his family chose to ascribe to the blows he had received from Villemin, which, however, was disproved by the medical witnesses. The Deaf Mute was in the first instance sentenced to two months' imprisonment; but on an appeal to the *Cour Royale* of Nancy, in consideration of the unfortunate condition of Villemin, and of the brutal and inconsiderate conduct of Marchand, the term was reduced to six days.*

Other cases may easily be supposed in which a Deaf person may be led to violent conduct by his inability to hear, and to understand what is meant by others. An impatient man, for instance, requests a Deaf Mute to get out of his way, and not knowing that the latter could not hear his request, attempts to shove him aside, thus provoking a manual retort. A Deaf Mute may also erroneously conceive himself wronged in making change, or in price, weight or measure, and break out into violence. In such cases, we are confident, there are very few who

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* Piroux' Journal, i, 46 and 59.

would undertake a prosecution for violence by a Deaf Mute, after becoming aware of his peculiar circumstances.

The disposition of courts and juries to mitigate the punishment of an uneducated Deaf Mute criminal has been shown in France and Germany, in several cases of murder, some of them of an aggravated character; for it is notorious that Deaf Mutes, who have grown to maturity without instruction, are too often passionate and vindictive. Bébian relates the case of Pierre Sauron, an unedcated Deaf Mute of the department of Cantal, who had formed an illicit connection with the daughter of a neighbor. The father, scandalized by such a connection with a dumb man, undertook to put a stop to it by sending his daughter out of the country. For this Sauron manifested the most implacable resentment, and finally waylaid and murdered him. The sentence was hard labor for life; for the like crime, one not deaf and dumb would have been sent to the guillotine. When the sentence was explained to the Deaf Mute, he declared he would rather be put to death.

Another case we find thus related in the Ninth Report of the Deaf and Dumb Institution of Hamburgh (Germany.) At Cologne, on the 14th or 15th of August, 1829, the royal Court of Assizes was occupied by an accusation against a Deaf and Dumb journeyman shoemaker, Johann Schmit, of Kreuznach, who, enraged at being upbraided for the defects of his work, had stabbed his master with a knife. The principal question discussed was, whether the early instruction and moral and intellectual state of the Deaf Mute made for or against his accountability. The jury found that the unfortunate murderer was not accountable; and he was therefore acquitted of the charge, and dismissed free into the street. "This, (adds the editor of the Hamburgh Report,) it is to be hoped, was not without that solicitude that might secure a better education to the unfortunate man, then twenty-three years old, and sufficient precautions lest he should become possessed with the idea that he could do such acts with impunity."

A much more aggravated case than either of the foregoing was that of Michael Boyer, an uneducated and vagabond Deaf Mute, of about 27 or 28 years, who was brought before the Court of Assizes of Cantal, (France,) under the triple charge of rape, murder and robbery, committed on a girl of eleven years, whom

he met in a lonely place on Christmas day, 1843, on her way to the residence of an aunt in a distant village, with whom she was to spend the winter, in order to attend school. Boyer was proved to have pursued other females with evident intentions of violence, and had been, some years before, condemned to three years' imprisonment for theft. The evidence, though circumstantial, was conclusive. It is not to our purpose to detail it. We observe, however, that the prisoner, being interrogated through M. Riviere, director of the school for the Deaf and Dumb at Rhodez, denied energetically the principal facts imputed to him, and succeeded in making it understood that he maintained that the blood observed on his garments came from a wound in the head, occasioned by a fall while in liquor. What plea was by his counsel set up in defence, we are not informed. The jury found him guilty of the triple charge, but admitted extenuating circumstances—a verdict the effect of which was to save the prisoner's life. He was condemned to hard labor for life and to the *exposition publique* (pillory or stocks.)* It should be observed, that the only extenuating circumstances that appear in the narrative of this fearful crime, were the total deprivation of instruction and neglected vagabond state of the criminal.

A similar verdict and sentence were given in the case of the Deaf Mute Emmanueli, of Corsica, who had waylaid and murdered the two sisters Ristori, provoked to frenzy by the obstinate refusal of one of them to listen to his prolonged suit. He had, some years before, killed her brother in a quarrel on the same account, and it being considered that he had acted with great provocation, was only condemned to five years' imprisonment—a lenity which the commission of the second, and far more aggravated, murder showed to have been misplaced.†

The details of another French case of murder by an uneducated Mute, Louis Chavanon, may be read in Beck's Medical Jurisprudence. This Deaf Mute was of such a covetous and grasping disposition, that he harbored the most violent enmity against any who purchased property of his father. The deceased, Treille, having become possessed, by purchase, of half of the house in which Chavanon lived, the latter, after repeated menaces in gestures, meeting him on the common stairs, an affray

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* Morel's Annales, ii. 166–170. † Piroux' Journal, iv. 144.

ensued which ended in the death of the unfortunate Treille. The sentence was ten years' imprisonment, and a fine of 1,000 francs to the widow and children of Treille.

Another deplorable instance of the ungovernable passions of too many uneducated Mutes is furnished by the case of Pierre Lafond, who, having been repeatedly detected in thefts of the property of his uncle and aunt, by whom he had been adopted and brought up, his aunt was at length provoked to the degree of following and reproaching him in the presence of a young neighbor, of whom Lafond was enamored. Watching an opportunity to execute the vengeance that rankled in his heart, he availed himself of the absence of his uncle to attack his aunt at night in her bed with several of the shoe knives used by him in his trade. Her daughters, coming to her assistance, were also grievously wounded, but providentially none of the victims were mortally touched. Taken a day or two afterwards, wandering in the fields, Lafond alleged, by the aid of an interpreter conversant with his signs, that he committed the act under the influence of a sudden fright and hallucination. However, neither this adroit defence, nor his unfortunate position, could make the jury forget the aggravating circumstances of the case. He was found guilty, and condemned to ten years at hard labor.*

The following curious and interesting trial is translated from Hitzig's Zeitschrift für deutsche und ausländiche Criminal Richts Pflege. Berlin, 1828:

A young man, named Filleron, was brought before the Court of Assizes at Paris, in August, 1827, charged wiih housebreaking and petty theft. Deaf and dumb from his birth, he had never enjoyed the advantages of education, and had neither kindred, friends, nor any regular occupation. Abandoned by his parents, he was received into the Orphans' Asylum, and afterwards transferred to the Bicètre, from which he ran away. Since that time, he has lived in Paris entirely isolated, without a home or any means of support, except what he received from some Deaf and Dumb persons. M. Paulmier, the successor of De l'Epée and Sicard in the direction of the Institution for the Deaf and Dumb at Paris, was employed as interpreter, and it was surprising with what ease he made himself understood by the prisoner, without

* Piroux' Journal, i. 56.

the assistance of the signs adopted in the Institution. He also understood and explained the meaning of the prisoner with great facility. Filleron entered the hall with a wrinkled brow and a vacant countenance, and having thrown a careless glance around the assembly, he remained motionless.

The President, with the assistance of M. Paulmier, asked him his name. This is the only word of which he knows the letters. He answered by signs that he was called Filleron, and signified, with his fingers, that he was nineteen years of age. The President desired that he might be asked where he was born. M. Paulmier, by motions and gestures, endeavored to convey to him the idea of a child in the cradle and at the breast. Filleron made signs that he had come from a great distance, and that his father was a mason; and raised and lowered his hands several times to imitate the motion of the waves. M. Paulmier explained his meaning to be that he was born on the sea-coast. M. Paulmier then enquired of him his place of abode, by laying his head on his hand as if asleep. For answer, Filleron scratched his hands, as if afflicted with a certain cutaneous disorder. By this, M. Paulmier understood him to mean that he lived in the Bicètre. The bill of complaint was then read, which charged that Filleron, (after he had ran away from the Bicètre, and had come to Paris,) by creeping under a door, and breaking a pane of glass, had effected an entrance into the Orphans' Asylum, in which he was educated, and had stolen the clothes of one of the young men; that three days after this, he again entered the Asylum, by jumping over the wall, and, after having eaten in the kitchen, had purloined a coal scuttle, three copper stew-pans and an apron. These articles were delivered by him to one Letertre, a well-known Deaf and Dumb cook, who invites customers by blowing a trumpet. Letertre had deposited the articles with a wine merchant, who, having his suspicions awakened, caused Filleron to be arrested. The President desired M. Paulmier to make Filleron understand that he was accused of the theft and housebreaking. M. Paulmier imitated the motions of a person who takes away a coat, and runs off; he then pointed his fingers to the accused, and then to the officers of the court. Filleron made a sign in the affirmative. M. Paulmier repeated his gestures, and at the same time imitated the movements of a cook, who shakes a stew-pan over the fire. Filleron signified, by lively

gestures, that he understood him; repeated the motions, and expressed with his fingers that he had stolen three stew-pans and a utensil managed with both hands. He was then asked how he effected an entrance into the Asylum. He now, by attitudes and motions, signified that he had crept under a door, broken a pane of glass with his knife, and, having passed through a long passage, got into the kitchen; that having eaten, he had taken three stew-pans from the nails on which they were hung, and, after wrapping them in a cloth, had made his escape.

President. "Ask him where he was educated?"

M. Paulmier lowered his hands, in order to convey the idea of a small child, and raised them gradually to represent its growth. Filleron placed his hand on the collar of his jacket, to signify that he was educated in the Orphans' Asylum, where the children wore grey jackets with red collars.

President. "He was sent away from the Asylum for bad conduct; ask him why he went away?"

Filleron answered this question, by signifying that he had assumed a sulky mien. He then scratched his hand, to express the idea that he had been sent to Bicêtre.

President. "Ask him if he has been employed as a tailor?"

M. Paulmier imitated the motion of a person who is sewing. Filleron made a sign in the negative, and folded his arms, in order to signify that he had no occupation. He then stretched them out, as if he were pushing violently; by this he intended to express the idea, that he had worked at a well, and turned the wheel.

President. "Ask him why he ran away a second time?"

Filleron expressed, by very intelligible signs, that he was tired and had been beaten. He then made a wry face, and turned his pocket wrong side outwards, to signify that he had not been well paid.

President. "How has he lived since he ran away from the Bicêtre?"

M. Paulmier drew a large circle, to represent the city of Paris, and imitated the motions of a man who is eating and sleeping. Filleron understood this at once, and placed himself in an attitude as if blowing a trumpet, and then pretended to eat, to signify that he had lived with Letertre.

President. "Ask him, whether, some days previous to his

arrest, he did not give five francs to one of the orphan boys, who was sweeping before the gate of the Orphans' Asylum.

M. Paulmier showed him five francs, and endeavored to convey to him the idea of a boy who is sweeping, to whom something is given. Filleron made a sign in the affirmative, and expressed, by signs, that he had obtained the money by working at the well.

President. "Ask him why he committed the theft?"

It was very difficult for M. Paulmier to make this understood. When Filleron, at last, comprehended his meaning, he expressed by signs, that he was large, subject to hunger and thirst, and that he must have a pinch of snuff.

President. "Ask him if he knows it is unlawful to steal."

M. Paulmier acted as if he would have Filleron take away his jacket, pointed to the gens-d'arms and the officers of the court, repeated the same signs pointing to himself, and then placed himself in a position as if he were seizing a thief, and binding his hands. To all this Filleron answered by imitating the motions of a man who acts eagerly to signify that he was forced by hunger to steal.

According to the statement of the Commissary of Police, before whom Filleron was first brought, when the stolen clothes he had on were taken from him, he evinced signs of the greatest despair, and attempted to seize the sabre of one of the gens-d'arms, and it became necessary to bind him. He then made signs as if in mockery, and as if he wished to throw himself into the water, or cut his throat. After this, he bent his head down and wept bitterly, and then remained motionless, and as if sunk in the deepest despondency.

To the question, whether he had broken into the Asylum, Filleron answered by signs that he had broken a pane of glass; but that it had been broken before, and he earnestly insisted on this last circumstance. When the stolen articles were shown to him, he recognized them as such, and made signs that he was hungry. M. Paulmier asked him if he was sorry. Filleron again expressed by signs that he was hungry and had nothing to eat; and then placed himself in an attitude, as if some one were pushing him and pointing out to him some object. M. Paulmier explained his meaning to be that he was instigated by some other Deaf and Dumb person to commit the theft. On motion

of the Advocate-General he was asked, whether he had not been already punished in the Asylum for theft. To this he answered by signs, that he was then very small, and that he was allowed but a very small portion of bread and was hungry. He then assumed the fixed posture of a soldier to signify that he had been punished in that manner.

President. "Asked him if he had any idea of religion."

M. Paulmier pointed to the heavens and placed himself in an attitude of supplication and struck himself on the breast, in sign of guilt. Filleron did not appear to understand him; but signified that it had been attempted to teach him to read and write. M. Magni, the Director of the Orphans' Asylum stated that he was convinced, that Filleron could not distinguish between good and evil.

The second witness was the Deaf and Dumb cook. He was a a pupil of the Abbé de l'Epée, and could understand and make himself understood with greater facility. He appeared to be in high spirits, saluted the court with great civility, and at the order of M. Paulmier, raised his hand with a very significant expression, denoting that he would open his whole heart. An inarticulate sound, to which he gave utterance, resembled the French word *oui*. He expressed, by signs, the letters of his name, Antoine Alexandre Letertre, and that he was forty-seven years of age; he then placed himself in an attitude, as if he were blowing a trumpet, and laughed heartily. He expressed, by very intelligible signs, that he had taken the stolen articles, and that Filleron had informed him that he had received them for the purpose of getting them tinned over. He manifested great abhorrence, placed one hand on his heart, and covered his eyes with the other, and then pretended to push back the stewpans that were lying on the table with violence, to signify that he did not know that they had been stolen. He then imitated the movements of a man, who is seized and bound to a post. M. Paulmier declared, that the honest Letertre well understood that theft was unlawful, and that its consequences were imprisonment and exposure in the pillory.

Here arose a very lively pantomime between Letertre and Filleron. M. Paulmier explained, that Letertre asserted, in contradiction of Filleron, that the latter had said, he had

received the stew-pans for the purpose of getting them tinned over.

President. "Ask the witness if Filleron has ever before delivered to him stolen goods." Letertre denied this, and made signs that he was honest, had a good heart, and pushed the stolen articles from him.

The other witnesses had nothing of importance to state.

The Advocate-General contended, that notwithstanding the compassion we may feel for the condition of the Deaf and Dumb, the law must take its course; that there were Deaf and Dumb persons, possessing intelligence and discernment; and that they were to be judged according to the measure of their understanding. In conclusion, he insisted that Filleron was capable of distinguishing between good and evil, that he had acted with intelligence, and must therefore be pronounced guilty. The counsel for the accused, in the defence, assumed the position, that a person Deaf and Dumb from his birth, who has never received any education, is not amenable to the law. In this condition, he cannot form any idea, for there is wanting to him *words*, the elements of all ideas. Even if, by a kind of inspiration and by observation, he has acquired a knowledge of the consequence of evil actions, still it would not be possible for him to choose, with a clear discrimination, between an action forced on him by a state of extreme necessity, like that of the prisoner, and a forbearance of that action for fear of its consequences. He has not that self control, that *freedom of will*, upon which all liability to punishment rests. His actions are not to be measured by the standard of morality. But suppose this portion to be untenable, he is not subject to punishment, according to the well established rule of law, *lex non obligat nisi promulgata*. However great may be his inclination, he cannot obtain a knowledge of the law, and the Apostle Paul says, 'I had not known sin, but by the law; for I had not known lust except the law had said, "Thou shalt not covet." Filleron has, indeed, seen punishments, executions, and gens-d'arms; but gens-d'arms are not the flesh become law. Were the seeing such objects as these sufficient to create a liability to punishment, a criminal code of laws would be useless, and it would only be necessary to ascertain whether the person accused has ever passed by a gallows.

Filleron was acquitted. He received an earnest admonition from M. Paulmier, which appeared to affect him.*

In the several French cases that have been cited, (and we might have cited other similar cases from Bebian's, Piroux' and Morel's Journals,) no difficulty appears to have been experienced in relation to the formalities of a trial; the questions that were raised related to the degree of moral accountability of the Deaf and Dumb. But the few English and Scotch cases we have are mostly of a different character. In these cases, the defence set up for Deaf Mutes accused of crime, has generally turned on legal forms and technicalities. As this paper has already extended to an unexpected length, and as the cases to which we refer can be consulted at large in standard works, we shall restrict ourselves to brief outlines.

In July, 1817,† Jean Campbell, an uneducated Deaf and Dumb woman, the mother of three children by three different fathers, was charged before the Court of Justiciary in Edinburgh, with murdering her child by throwing it over the old bridge at Glasgow. Mr. Robert Kinniburgh, an eminent teacher of the Deaf and Dumb, was called in as an expert; and understood from her signs that she maintained that, having the child at her back, held up by her cloak, which she held across her breast with her hands, being partially intoxicated, she had loosened her hold to see to the safety of some money in her bosom, thus allowing the child to fall over the parapet of the bridge, against which she was resting. She indignantly denied having intended to throw it into the river.

"Mr. Kinniburgh being asked whether he thought she could understand the question, whether she was guilty or not of the crime of which she was accused? answered that in the way he put the question, asking her by signs whether she threw her child over the bridge or not? he thought she could plead not guilty by signs, and this is the only way in which he could so put the question to her, but that he had no idea, abstractly

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* See American Jurist, vol. 3, p. 158.

† Beck gives this date, 1807, which is a manifest error, as Mr. Kinniburgh of the Edinburgh Institution for the Deaf and Dumb, which was first opened in 1810, was called in the case, and referred, in giving his evidence, to his Report for 1815.

speaking, that she knew what a trial was, but that she knew she was brought into court about her child."

"John Wood, Esquire, auditor of excise, (who is deaf and partially dumb,) gave in a written statement upon oath, mentioning that he had visited the prisoner in prison, and was of opinion that she was altogether incapable of pleading guilty or not guilty; that she stated the circumstances by signs, in the same manner she had done to the court, (when questioned before the court by Mr. Kinniburgh,) and seemed to be sensible that punishment would follow the commission of a crime."

"The court were unanimously of opinion that this novel and important question, of which no precedent appeared in the law of this country, (Scotland,) deserved grave consideration, and every information that the counsel on each side could procure and furnish."

"At a subsequent period, the judges delivered their opinion as follows:

"Lord Hermand was of opinion that the panel (prisoner) was not a fit object of trial. She was deaf and dumb from her infancy; had had no instruction whatever; was unable to give information to her counsel, to communicate the names of her exculpatory witnesses, if she had any, and was unable to plead to the indictment in any way whatever, except by certain signs, which he considered no pleading whatever."

The other four judges, however, overruled this opinion, referring especially to a case (already mentioned in a former part of this paper) that had occurred in England in 1773, in which one Jones, who had stolen five guineas, appearing to be deaf and dumb, and being found by the jury empanneled on that point, to be mute "from the visitation of God," was arraigned by the means of a woman accustomed to converse with him by signs, found guilty and transported. And it was also observed that it might be for the prisoner's own good to have a trial; for if the jury found that her declaration, that she did not intend to throw her child in the river, was true, she would be acquitted and set free; whereas, if not found capable of being tried for a crime, she must be confined for life. The woman Campbell was accordingly placed at the bar, and when the question was put, guilty or not? "her counsel, Mr. McNeil, rose, and stated that he could not allow his client to plead to the indictment, until it

was explained to her that she was at liberty to plead guilty or not. Upon it being found that this could not be done, the case was dropped, and she was dismissed from the bar *simpliciter*. Thus, though it is established that a Deaf Mute is *doli capax*, no means have yet been discovered of bringing him to trial."

Certainly the system of laws in Scotland must be defective, under which important leading cases are decided, not on broad general principles, but on mere formalities and technicalities.

We find an English case, similar in some of the circumstances to that just cited. In 1831, a woman (Esther Dyson) was indicted at the York Assizes (England) for the willful murder of her bastard child by cutting off its head. Upon an arraignment she stood mute; a jury was empanneled, and evidence being given that she had always been deaf and dumb, the jury found that she was mute by visitation of God. Mr. Justice Park then directed that an interpreter should be sworn to communicate with her by signs, which was done, and the interpreter explained to her by signs what she was charged with, and she made signs obviously imputing a denial, and which the interpreter explained to be a denial. Justice Park then directed a plea of not guilty to be recorded. The interpreter was then directed to explain to her that she was to be tried by a jury, and that she might object to any of the jurors if she pleased; but the interpreter, as well as another witness, stated that it was impossible to make her understand a matter of that nature, although upon common subjects of daily occurrence which she had been in the habit of seeing, she was sufficiently intelligent. One of the witnesses had instructed her in the dumb alphabet, but she was not so far advanced as to put words together, and the witness swore that though she was *then* incapable of understanding the nature of the proceeding against her and of making her defence, he had no doubt that with time and pains she might be taught to do so, by the means used by the instructors of the Deaf and Dumb. Justice Park then directed that a jury should be empanneled to try whether she was sane or not, which having been done, the same witnesses were then examined and testified to her incapacity at *that time* to understand the mode of her trial or to conduct her defence. Whereupon, the judge—after stating upon the authority of Sir Matthew Hale, that if a person of sound memory commits a capital offence, and afterwards at any

period becomes insane, that he cannot be proceeded against during the existence of his phrenzy, but must be kept in prison until his incapacity is removed; and that where the offence charged is either treason or murder, that the fact whether the alleged insanity is real or counterfeit is to be enquired into by a jury—told the jury that if they were satisfied that the woman had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane. The jury found that she was not sane, and she was therefore ordered to be kept in strict custody until the king's pleasure should be known.*

Five years afterwards, in March, 1836, a similar question came before Baron Alderson. A man was indicted for bestiality. Upon being put to the bar, he appeared to be deaf and dumb, whereupon a jury was empanneled, who found he was mute by visitation of God. As the prisoner was able to read and write, the indictment was handed to him which he read, and made a sign that he was not guilty. Upon this the jury found that he was able to plead, and that point having been determined, the next question submitted to the jury was, whether he was then sane, and could be put upon his trial for the offence. On the part of the crown, evidence was given with a view of showing that, on the examination before the magistrate, he had understood the charge, and had answered in writing. But several witnesses swore that he was nearly an idiot, and had no proper understanding; and that though he might be made to comprehend some matters, yet he could not understand the proceedings upon the trial. In submitting the case to the jury, Baron Alderson said that the question was, whether the prisoner had sufficient understanding to comprehend the nature of the trial, so as to make a proper defence to the charge, and that *three* points were to be enquired into. *First*,—Whether the person was mute of malice or not. *Second*,—Whether he can plead to the indictment or not. *Thirdly*,—Whether he is of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence—to know that he might challenge any of the jurors to whom he might object, and to comprehend the details of the evidence, which, in a case

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* *Rex* v. *Dyson*, 7 Car. and Pay. 305.

of this nature, must constitute a minute investigation. That if they thought that there was no certain mode of communicating the details of the trial to the prisoner, so that he could clearly understand them, and be able properly to make his defence to the charge, that they ought to find that he was not of sane mind. That it was not enough that he might have a general capacity of communicating on ordinary matters. The jury found that the prisoner was not capable of taking his trial, whereupon the Court directed that he be confined in prison during the king's pleasure. This case, it appears, was considered by several of the judges, and the course pursued by Baron Alderson was approved.*

These two cases suggest the question, whether the law ought not to recognize and make provision for that intermediate state between full accountability and total want of capacity to commit crime, which cases, like that of Esther Dyson, strikingly evince.

If her case had been brought before a French tribunal, instead of staying proceedings on a point of form, thus condemning to an indefinite term of imprisonment one who might after all be innocent, the trial would have proceeded; and it would have been for the jury whether to acquit her either as innocent in fact, or not accountable; or to find her guilty, with extenuating circumstances. In the latter case her punishment would hardly be more severe than the imprisonment, perhaps perpetual, inflicted on Esther Dyson without trial.

We recollect a case that was tried in Essex county, New Jersey, about twenty years since, in which a man evidently deaf, and pretending to be dumb also, was tried and convicted of sodomy. Doubts were expressed whether the prisoner was both deaf and dumb, because specimens of his writing, exhibited to the court, showed a much better acquaintance with the sounds than with the orthography of words. There appears, however, from what we recollect of the case, no reason to doubt that he was deaf, the most decisive test being that the sentence of several years' imprisonment at hard labor, though pronounced in a loud voice, produced no effect on him; but when it was communicated in writing, he showed evident signs of being strongly affected. As he was able to read and write, his examination

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* *Rex* v. *Pritchard*, 7 Car. and Pay. 304.

was at first in writing; but, at a later stage of the proceedings, a Deaf-Mute interpreter was procured. He was a wanderer from abroad, whose previous history was known only from his own account, and had probably lost his hearing after learning to read and write. He appears to have prejudiced his own cause by pretending to be both deaf and dumb; since the suspicion thrown on the latter point by the test that he knew words by their sounds, rather than by their orthography, caused it to be supposed that his deafness also was simulated to excite compassion. We mention this case, (of which we have no legal record,) for the sake of observing that, in cases where a person pretends to be deaf and dumb, and to have been taught to read and write in the mode in which Deaf Mutes usually are taught, the best test for detecting him, (next of course to proving directly his ability to hear and speak,) is by observing whether in writing he shows an acquaintance with the sound rather than with the orthography of words. The compositions of Deaf Mutes are often disconnected, erroneous in syntax, or obscure or improper in expression; but they are not very apt to make blunders in orthography.* A man who writes idiomatic English, even of the homeliest kind, with an orthography governed by the sound of the words, (e. g. *I du not no*,) cannot be a Deaf Mute, though he may perhaps be deaf from childhood.

From the facts and reasonings presented in the course of this paper, we deduce the following general principles, for which we have obtained the sanction of some eminent members of the legal profession, and which are respectfully submitted, as being consonant to reason, and hence to law, according to the famous dictum that law is the perfection of reason.

As a knowledge of words is not necessary to moral and mental development, a Deaf Mute who cannot read or write is not *necessarily* more ignorant in matters that can fall under his personal observation, or that form the ususal topics of conversation in signs between him and his acquaintances, than illiterate

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* And when Deaf Mutes do make blunders in orthography, they consist in omitting or transposing letters; not in spelling words according to their sound, or substituting one word for another of like sound, unless so taught by ignorant associates.

persons who are not deaf and dumb. Hence a Deaf Mute who has no knowledge whatever of written language, may yet, if his dialect of gestures is sufficiently copious and precise, possess the intelligence necessary to manage his own affairs, to make all civil contracts, to execute a deed or a will, or to give evidence in a court of justice, proper precautions being taken that the interpreters, who accompany him before the attesting notary or magistrate, are faithful, competent and disinterested.

But as the degree of intelligence and of moral development in uneducated Deaf Mutes is very various—some who have been neglected in infancy being but a step above idiots—they should be carefully examined to ascertain whether they really possess the necessary degree of knowledge and intelligent will. And where any doubt may exist, it is advisable that teachers of the Deaf and Dumb should be called in, as being more able to appreciate such cases than any other persons, and usually more expert in conveying ideas by pantomime than even the friends of an uneducated Mute usually are.*

Cases however, as we have seen, occur in which the Deaf Mute has formed with some intimate companion a peculiar dialect, not to be understood by others. Here some person who is conversant with the dialect used by the Deaf Mute will be the best interpreter. This is more especially the case with those

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* The late excellent T. H. Gallaudet, in an article in the American Annals of the Deaf and Dumb, "On the Natural Language of Signs," (vol. i, p. 57,) states the following fact: "The writer of this article, some years ago, was requested, with a fellow laborer of his, at the time, in the American Asylum, to visit a Deaf Mute in a neighboring town, about eighty years of age, possessed of some property, and desirous of making a will. He could not read, nor write, nor use the manual alphabet. He had no way of communicating his ideas but by natural signs. By means of such signs, exhibiting a good deal of ingenuity on the part of the old man, myself and companion were able to understand definitely the disposition which he wished to make of his property among his relatives and friends, and thus to enable him to carry his views into effect under the sanction of the law."

In cases of a criminal charge, the nearest friends of the Deaf Mute accused would hardly be reliable interpreters. In England, some years ago, a Deaf Mute, named Howitt, was charged with murder. His father attended his examination as interpreter, but the coroner's jury, thinking he did not interpret some very expressive gestures of the Deaf Mute, adjourned to procure a more disinterested interpreter. Piroux' Journal, v, 18.

Deaf Mutes who retain an imperfect remnant of speech, and endeavor to understand what is said to them by the motions of the lips, aided by peculiar grimaces.

With respect to the formalities used, it may be laid down as a general rule, that the Deaf Mute who can read and write but imperfectly, or not at all, should be regarded as in the position of a German or Frenchman, whose ignorance of our language necessitates the employment of a sworn interpreter between him and the court.

But where the Deaf Mute can read and write well, the best mode is that prescribed in the French code. In the case of such, reading supplies hearing, and writing supplies speech. Hence it follows that a paper presented to a well-instructed Deaf person, calling his attention by pointing with the finger to the writing, should be considered as read to him, (it being understood of course that there should be sufficient light and sufficient legibility of writing). We think, however, it ought to be specially enacted that a legal service in the case of *such* persons should consist in giving them a copy of the writ or notice to be served, informing them by writing of its nature or contents, and in the case of Deaf Mutes who cannot read, or but imperfectly, the reading may be accomplished by the aid of a competent interpreter. Any legal oath or obligation may be taken or assumed by a well instructed Deaf person, by writing out with his own hand the formula before witnesses, with such forms of solemnity as the occasion may demand; or by a conversation in writing with the officiating magistrate.

It should, however, be generally understood, that many of the Deaf and Dumb who have received more or less instruction in our schools, are still but imperfectly acquainted with written language, and that signs are the surest and readiest means of reaching their conscience and intelligence—the surest means also that they possess for explaining their own meaning clearly.

With respect to civil rights, the Deaf Mute possesses all the rights of his fellow-citizens, whose situation, Deaf-Mutism aside, is the same as his own. Imbecility, insanity, and, in some cases even, extreme ignorance may disqualify him from making contracts, and necessitate the appointment of guardians—but not mere inability to write and read, if he evinces, by means of signs, the requisite intelligence.

And before the criminal, as well as before the civil law, the Deaf Mute has the same rights, and is subject to the same accountability as his brother who hears and speaks. We trust no attempts will be made by unscrupulous pleaders, or, if made, will be successful, to deprive him of the right to bear witness against those who have wronged him; and, on the other hand, while we ardently desire to see all the Deaf and Dumb reach that degree of moral improvement which shall preserve them from crime, yet, when they do come before the criminal tribunals, we do not wish to see them screened from deserved punishment by mere technicalities, or by arguments of want of moral accountability in the Deaf and Dumb generally. The ignorance and neglected condition of an uneducated Deaf Mute may, however, be justly urged in extenuation of his faults, as an appeal to the compassion of the court, or of the pardoning power. And cases may occur in which a Deaf person has acted under erroneous impressions, natural in his circumstances; as, for instance, in resisting legal process, believing it to be unlawful violence. In such cases there is evidently no more accountability than in cases of hallucination.

And as it is of great importance to every man whose interests, liberty or life are at stake in a court of law, to know, as they transpire, the proceedings and evidence against him, we think it ought to be made a rule, that in all such cases an interpreter should be assigned to the Deaf Mute, who will keep him advised of at least all the important points in the proceedings, by writing, or by the manual alphabet and signs, according as the one mode or the other is more clearly intelligible to the prisoner.

NOTE.

We have not discussed, in the foregoing paper, the right of a Deaf Mute to vote, when otherwise legally qualified, because we had not met any case in which that right was contested or denied, (if the French case, in which the Deaf Mute was judged incapable of understanding the electoral oath, be excepted,) till after this report was written. Very recently we have met with a paragraph in Smith's History of New York, (edition in the collections of the New York Historical Society, vol. ii,

p. 293.) Of several points "resolved by the Assembly in the exercise of their judicial authority, respecting the qualifications of their own members" on occasion of contested elections, in 1761, the last was:

"5. That a man deaf and dumb from his nativity has no vote."

On this case we make two observations. First, that as a property (we think a freehold) qualification was then required for voters, the Deaf Mute (for evidently the resolution refers to a vote actually received or offered) was possessed of property, probably by inheritance, showing that, at that time, Deaf Mutes were practically considered incapable of possessing property; and second, that under a system of *viva voce* voting, which, if we mistake not, then prevailed in the Colony, as it still does in England, it would be hardly possible for an uneducated Deaf Mute to give his vote, since he could name his candidate neither by speech nor writing. If his intelligence was such that he ought to be admitted to vote, some special statutory provision would be necessary in his case, under a system of *viva voce* voting. Where the voting is by ballot, however, no such special provision is necessary.

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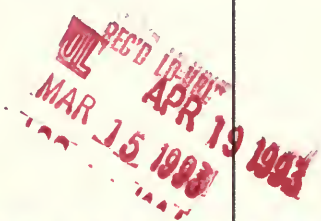

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